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SATYARANJAN DAS

On The

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(Tagore Law Lectures)

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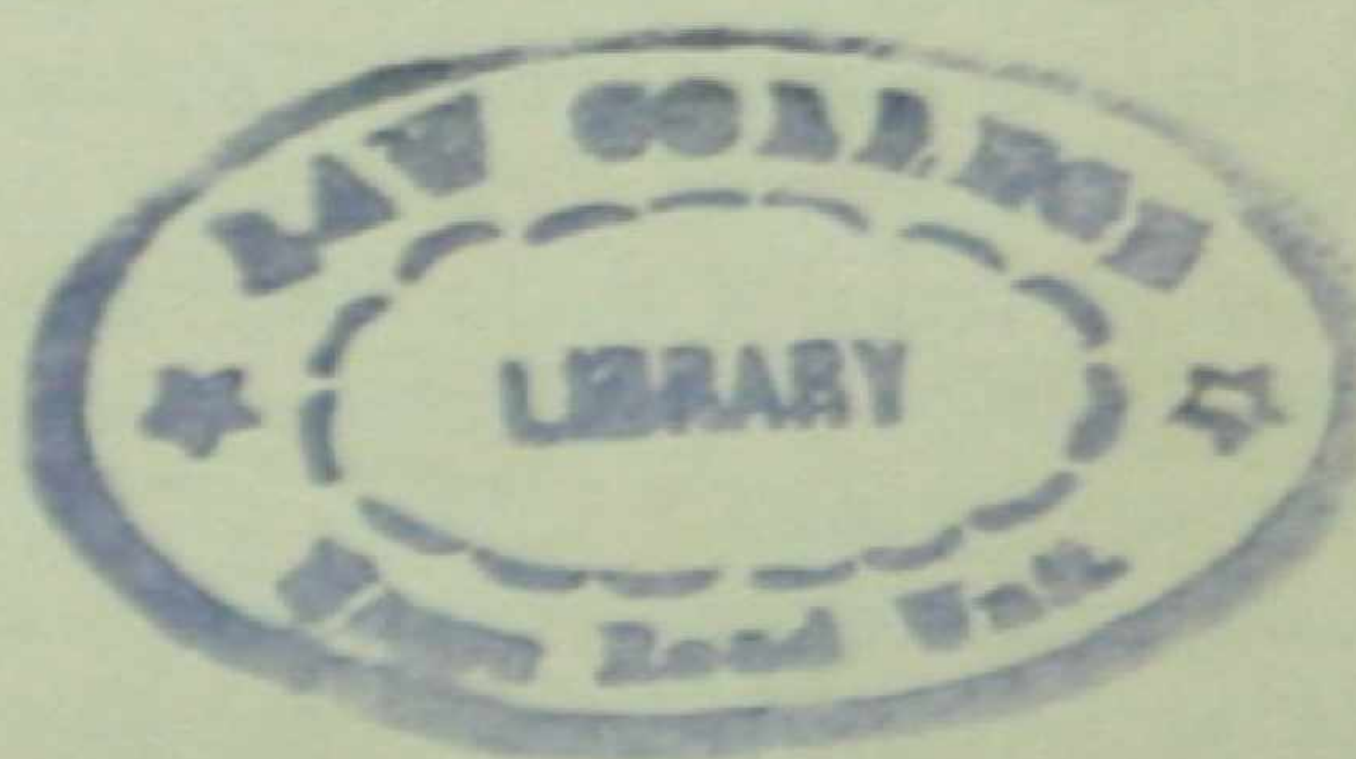
SECOND EDITION

by

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West Bengal*



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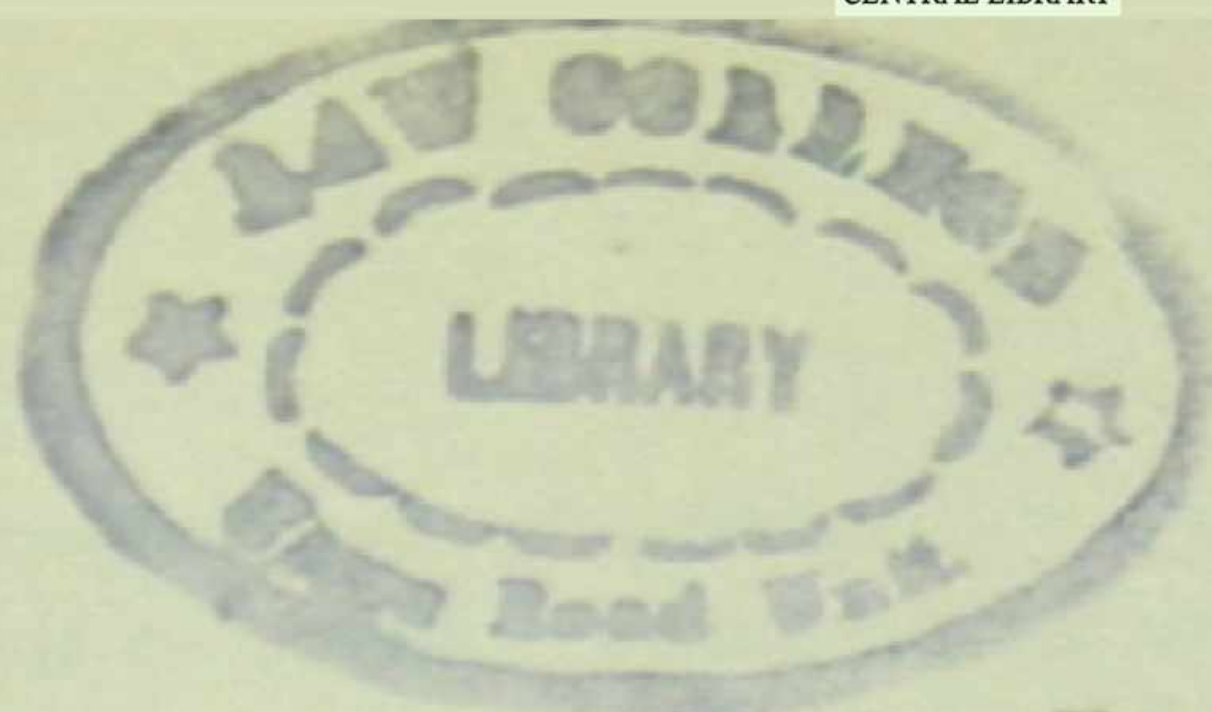
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PREFACE

The Hon'ble Prasanna Coomar Tagore of the celebrated Tagore family of Calcutta and a fellow of the Calcutta University had, in the second half of the last century created the Tagore Law Professorship which has in course of time grown into an institution by itself. With his munificence the Calcutta University has been inviting renowned scholars, jurists and judges from different States of India and from countries abroad to deliver lectures as Tagore Law Professor. These lectures, as the donor wished, have enriched our knowledge in different aspects and branches of law and the present generation has thus inherited a rich legal literature to nourish and guide them and more particularly the earnest students of law in their journey and quest for opening new dimensions to law and the legal literature keeping with the rapid changes in society and the intellectual development of the race.

As the present century opened one of those lecturers Mr. Satya Ranjan Das, an erudite scholar and Bar-at-Law of Lincoln's Inn, London, delivered a series of lectures on the Law of Ultra Vires—a subject which has assumed great significance and deep importance in the present complex society as the century is nearing towards it close. This is more so particularly in the context of the political changes, the industrial revolution, the socialistic pattern of economic development, the growth of different institutions both in the public and private sectors, the various social legislations, the inevitably close and not unoften strained relationship between the employer and the employed, the gradual development of constitutional law of the country, working and experimenting with a written constitution guided by a mechanism—executive, legislative and judicial—wholly cast and moulded in Britain and borrowed from the United Kingdom which enigmatically has an unwritten constitution. Whenever any statutory provision be it of the constitution or of any ordinary legislation or any principle of natural justice is in the least slighted, by-passed, ignored or violated in a manner colourable or otherwise by the Executive or a Quasi-judicial authority or even by the Legislature itself, the watchful eyes of the law of *ultra vires* come to the rescue of the victim. The field of this particular branch of law is rich and wide. The subject assumes vast importance in any country having a constitution, either written or unwritten, unitary or federal. Even Lord Denning, Master of the Rolls, recently voiced the proposition that English Courts should have the same power as the Supreme Court of the U. S. A. to declare legislation unconstitutional and invalid. This proposition has, however, raised a controversy as its practical feasibility is far away in that country as Britain has no written constitution as the U. S. A. or India has. The law of *ultra vires*, however, does provide the most effective and the only beacon light for creating an area of checks and balances so much needed for a well-ordered society.

The professor, Mr. Das, very unfortunately died shortly after the lectures were delivered and his manuscripts had remained as they were until 1923 when the present publishers had brought out the lectures in a book form for the first time. More than 50 years have passed since then and much water has flown down the Ganges during this period of a little more than half a century. In the present edition his original lectures have been revised and enlarged keeping pace with the changing laws and movement of the society but at the same time I have endeavoured to preserve almost everything that was spoken about by Mr. Das in his learned discourses in the different lectures—keeping his method, style and language undisturbed. They have their importance for research purposes as one cannot detach the past from the present and a time has come when one should think of the future of our past. The lectures not only indicate the evolution of the law on so important a subject but also give a perspective of the revolutionary changes that have taken place during these years. I was very much inspired in preserving the old lectures not only out of my respect to the Tagore professor but also by the fact that the authorities of the Victoria Memorial have recently engaged themselves in co-operation with the Calcutta High Court in microfilming old records of the Mayor's Court, the Supreme Court and the present High Court of Calcutta. The Supreme Court records refer to the growth not only of Calcutta but also to the socio-cultural relations between India and England during the 18th and 19th Centuries.

These lectures, as revised, will not only help the readers in appreciating the nature, growth and the working of the law of *ultra vires* but also in understanding better the Indo-British period of those days and will take the readers into the 20th Century and the transition from foreign domination to Independent India. The Government of India Act, 1935, the Independence Act, 1947 and the Constitution of India besides the old and the new Companies Act, the High Courts, Corporate bodies, Municipalities, the Services, Labour Laws and taxation have also been discussed with as many decided cases as could be possible within the brief span of these lectures, without, at the same time making them cumbrous.

In preparing this edition I was greatly assisted by my son, Mr. Tapas Kumar Das, Advocate, High Court, Calcutta and my thanks are due to Mr. Sujit Kumar Kerr of Messrs. R. Cambray & Co. (P) Ltd., the publishers, for seeing the book through the press.

14, Duttapara, Chatra,
Serampore (Hooghly).
September, 1, 1981.

Manindra Nath Das.

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INTRODUCTION

The subject on which I am about to address you, is the law as regards *ultra vires*. The doctrine of *ultra vires* is the same in this country as in England.

Title.

The meaning of the term *ultra vires* is simply "beyond (their) Powers." In a popular sense these words include all exercise of power beyond the competency of the *person* exercising that power. Strictly speaking it has to be differentiated from want of jurisdiction or illegality. We hear, however, even Judges applying the term to acts done without jurisdiction (a), or to acts of illegality (b). I have no doubt that originally these words were used to express every exercise of power which was not warranted by the authority under which the person was purporting to act. But the phrase *ultra vires* has now acquired a definite legal significance. To understand this, we must first distinguish it from the expressions "want of jurisdiction" and "illegality."

Meaning of the term *ultra vires*.

Not the same as "want of Jurisdiction" or "Illegality".

Jurisdiction has been defined to be a power conferred by the State on a Magistrate or Judge to take cognisance of and determine questions according to law, and to carry his sentence into execution. From jurisdiction in general must be distinguished the competency of a tribunal. By that phrase is meant the right which a tribunal has to exercise in a particular case the jurisdiction which belongs to it. The importance of the distinction arises from the fact that a plea of incompetency can be waived by consent of parties, whereas such consent can never confer jurisdiction where none exists (c).

Definition of "jurisdiction."

From the above definition of the term jurisdiction we see that although it is a *power* conferred by the State, it connotes three things:—

What it connotes.

- (1) The power to take cognisance of a question.
- (2) The power to determine the question at issue, after taking cognisance.
- (3) The power to carry out that determination or decision, by executing the decree or sentence.

(a) See *Lal Singh v. Ghansham Singh*, I. L. R. 9 All. 625.

(b) See *Ashbury Railway Carriage & Iron Company v. Riche*, L. R. 7 H. L. 653.

(c) See Digest 5, 1, 1, 2 pr., §1; 2, 1, 15. The word jurisdiction is used in English law to denote both the authority of a Court of Judge, and the territorial limits within which it is exercisable.

In the case of *Mohesh Chandra Dass v. Jamiruddin Mollah* (d), the High Court of Bengal considered the meaning of the word "Jurisdiction" with reference to section 578 (now section 99) of the Code of Civil Procedure (e).

Defined by the High Court of Bengal.

Banerjee J. said: "That word (meaning jurisdiction) is used in two different senses. It may either mean what is ordinarily understood by the term jurisdiction when used with reference to the local jurisdiction of a Court, or its jurisdiction with reference to the subject-matter of a suit, or it may mean the legal authority of a Court to do certain things."

It is often in the sense of want of "legal authority of a Court to do certain things," that the term *ultra vires* is incorrectly used.

Confusion between the terms *ultra vires* and "want of jurisdiction".

But, we never find the phrase "want of jurisdiction" used to signify the exercise of a power, say, by a joint-stock company which they do not possess. In fact,

the word jurisdiction is limited to the exercise of a power connected with litigation, and is exclusively confined to the powers of a Court of Law, be it civil, or be it criminal. We can thus draw a broad distinction between the terms "without jurisdiction" and *ultra vires*. All acts beyond the powers of a Court of Law, when adjudicating between litigants, are known as acts done without jurisdiction. All acts done by *persons* (f), exercising statutory or other powers, beyond the powers possessed by them are known as *ultra vires*. The words "when adjudicating between litigants" are a very necessary limitation to the definition of the phrase "without jurisdiction." Our Courts of Law, specially the High Courts, have various powers delegated to them by the legislature, besides the power to adjudicate between litigants. For instance, under certain legislative enactments, the High Courts are given the power to make rules, consistent with such Acts, to carry out certain provisions of those Acts. In exercising those powers, the High Courts do not act in their judicial capacity, and if they frame a rule which they are not empowered to frame, the rule will be one made *ultra vires*. The phrase "without jurisdiction" would be strictly speaking, inapplicable to such a

In re New Fleming & Co. Ltd.

case. Thus, where under the powers given by the Indian Companies Act, (X of 1866, § 189) (g), the High Court of Bombay framed the following rule:

"Any creditor, whose debt or claims so allowed does not carry interest, shall

(d) I. L. R. 28 Cal. 324 (329).

(e) "No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal, on account of any error, defect or irregularity, whether in the decision or in any order passed in the suit, or otherwise, not affecting the merits of the case or the jurisdiction of the Court. Provided that nothing in this section shall apply to nonjoinder of a necessary party".

(f) "Person shall include any company or association or body of individuals whether incorporated or not." General Clauses Act (X of 1897) sec. 3, sub-sec. 39.

(g) The High Court may make such rules concerning the mode of proceeding to be had for winding up a Company in such Court and in the Courts subordinate thereto, as may from time to time seem necessary and as may be consistent with the other provisions of this Act and with the Code of Civil Procedure.

be entitled to interest at the rate of six per centum per annum, from the date of the order to wind up the company, out of any assets which may remain after satisfying the costs of the winding up, the debts and claims established, and the interest of such debts or claims as by law carry interest," it was held that under a power to make rules concerning the mode of proceeding in winding up, there is no authority given to make a rule which allows interest, not otherwise given by law, this being a matter of right, not a mode or proceeding (h). The rule was held to be *ultra vires* of the High Court and consequently a nullity. Now, section 189 of the Indian Companies Act, (X of 1866), agrees substantially with section 170 of the English Companies Act, 1862, (25 & 26 Vict., c. 89), and the Judges of the Court of Chancery in England, framed an identical rule as regards interest. In fact, the Bombay High Court rule was a *verbatim* reproduction of the Chancery rule, with the exception of the rate of interest. The rule of the Court of Chancery was held by Lord Westbury in *The Hatfield Cask Company* (i), by Lord Romilly in *The Herefordshire Banking Company* (j), and by Lord Cairns in *The East of England Banking Company* (k), to be *ultra vires* and as not warranted by the statutes.

Again, by the Presidency Small Cause Courts Act (XV of 1882), section 33, the High Courts were given power to declare from time to time by rule what shall be deemed to be non-judicial and *quasi-judicial* acts within the meaning of that section. It was also enacted by the same section that "any non-Judicial or *quasi-judicial* Act which the Code of Civil Procedure as applied by this Act, requires to be done by a Judge.....may be done by the Registrar of the Small Causes Court.....". By a rule passed by the High Court of Judicature at Madras, the High Court declared under this section that "granting leave to sue defendants out of the jurisdiction under section 18, clauses (a) and (c) of the Presidency Small Cause Courts Act, 1882" (l), was a non-judicial or *quasi-judicial* act within the meaning of section 33 which might be done by the Registrar of the Court of Small Causes, Madras (m). It was held by the Full

Rajam Chetti v. Seshayya.

(h) *In re New Fleming Spinning and Weaving Company Limited*, I. L. R. 3 Bom. 439 (450).

(i) 9 Jur. N. S. 997.

(j) L. R. 4 Eq. 250.

(k) L. R. 4 Ch. 14.

(l) Section 18, clauses (a) and (c) are as follows:—

Subject to the exceptions in section 19, the Small Cause Court shall have jurisdiction.....

(a) the cause of action has arisen, either wholly or in part, within the local limits of the jurisdiction of the Small Cause Court, and *the leave of the Court* has, for reasons to be recorded by it in writing, been given before the institution of the suit; or

(c) any of the defendants, at the time of the institution of the suit actually and voluntarily resides, or carries on business or personally works for gain, within such local limits, and either *the leave of the Court* has been given before the institution of the suit.....

(m) Fort St. George Gazette of 3rd December 1885.

Bench of the Madras High Court, that the declaration and the rule of the High Court was *ultra vires* (n), Collins, C. J., holding that "under section 18 of the Act it is enacted that the leave of the Court must be given—the High Court by the rule has set aside that provision of law and has said that the leave of the Registrar is sufficient; it is impossible to say that a Registrar is a court for such a purpose as this—the duties and powers of a Registrar are strictly defined and limited. It is also impossible to say that granting leave to sue a defendant out of the jurisdiction under section 18, clauses (a) and (c) was a non-judicial or a *quasi-judicial* act." Shephard, J., said: "It has to be seen whether this particular rule is a rule which it was competent to the High Court to pass either under the statute (24 & 25 Vict., c. 104, § 15) or under the Code. The power given in the former enactment is 'to make and issue general rules for regulating the practice and proceedings of such Courts'; in the latter enactment 'to make rules consistent with the Code to regulate any matter connected with the procedure of the Courts subject to its superintendence.' Now it is a recognised principle of law that the rules made in pursuance of a delegated authority to that effect must be consistent with the statute under which they came to be made. The authority is given to the end that the provisions of the statute may be better carried into effect, and not with the view of neutralizing or contradicting those provisions. In the present case, there is a distinct provision of the Act requiring in certain cases that leave of the Court shall be given before the institution of a suit. Under clause (a) of the 18th section the leave of the Court for reasons recorded in writing has to be given. The effect of the rule is to dispense with the leave of the Court and substitute the leave of the Registrar. In my opinion, the rule is manifestly inconsistent with the section. It has the effect of neutralizing the section, not of carrying it into effect."

Here, the High Court of Madras had every right to declare what were non-judicial or *quasi-judicial* acts. But, in declaring them they went beyond their powers when they declared an act which the Act itself considered a judicial act to be a non-judicial or *quasi-judicial* act. Hence the rule or the declaration was *ultra vires* of the High Court.

"Illegality," in the largest sense of the word, no doubt includes what is *ultra vires*. What is beyond the powers of a person is illegal in the sense that everything is illegal that is not warranted by law. But, "illegal" and *ultra vires* are phrases to which distinct meanings have, and very properly have been attached. "Illegal" in the strictest application of the word refers to that quality which makes the act itself one contrary to law. The term *ultra vires* has reference to the legal power of a person to do an act. An act may be legal and at the same time *ultra vires*. It is, therefore, important that the words "illegality" and *ultra vires* should each be used with due regard to its proper signification.

(n) *Rajam Chetti v. Seshayya*, I. L. R. 18 Mad. 236.

The distinction between the two has been very lucidly expressed in the judgement of the New York Court in the case of *Bissell v. Michigan Southern &c. Railway Companies* (o). "The words *ultra vires* and illegality represent totally different and distinct ideas. It is true that a contract may have both these defects, but it may also have one without the other. For example, a Bank has no authority to engage, and usually does not engage, in benevolent enterprises. A subscription made by authority of the Board of Directors, and under the corporate seal, for the building of a Church, or college, or an Alms-house, would be clearly *ultra vires*, but it would not be illegal. If every Corporator should expressly assent to such an application of the funds, it would still be *ultra vires*, but no wrong would be committed and no public interest violated. So, a manufacturing corporation may purchase ground for a school-house or a place of worship for the intellectual, religious and moral improvement of its operatives. It may buy tracts and books of instruction for distribution among them. Such dealings are outside of the Charter; but, so far from being illegal or wrong, they are in themselves benevolent and praiseworthy. So, a Church Corporation may deal in exchange. This, although *ultra vires*, is not illegal, because dealing in exchange is, in itself, a lawful business, and there is no State policy in restraint of that business."

Distinction between *ultra vires* and illegality drawn by American Courts.

In *Ashbury Railway Carriage &c. Company v. Riche* (p) Lord Cairns, L. C., draws the same distinction between the words "illegality" and *ultra vires*. He says, "I have used the expressions *extra vires* and *intra vires*. I prefer either expression very much to one which occasionally has been used in the judgements in the present case, and has also been used in other cases, the expression 'illegality.' In a case such as that which your Lordships have now to deal with, it is not a question whether the contract is *malum prohibitum* or *malum in se*, or is a contract contrary to public policy, and illegal in itself. I assume the contract in itself to be perfectly legal, to have nothing in it obnoxious to the doctrine involved in the expressions which I have used. The question is not as to the legality of the contract; the question is as to the competency and power of the company to make the contract."

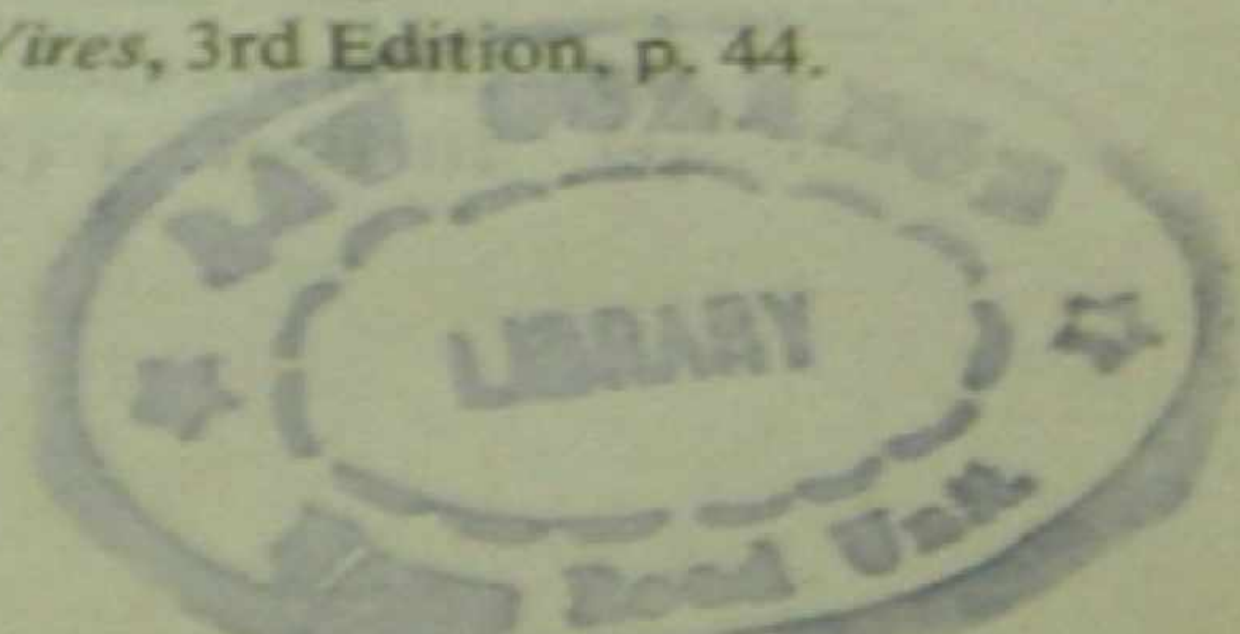
By the House of Lords.

To make this more clear, we will take the instance of acts done or purported to be done, say, by a joint-stock company. Now, such acts may be void on several grounds which may be summarized as follows:— (1) Because they are contrary to public policy generally, as for instance, an agreement for compounding a felony; (2) because they may be forbidden by statute, as for instance, the holding of lotteries; (3) because they are contrary to the policy of the Companies Act, as for instance, the reduction of the capital of the company not carried out in accordance with the provisions of that

Examples of acts illegal and *ultra vires*.

(o) 22 N. Y. 258; quoted in Brice on the Doctrine of *Ultra Vires*, 3rd Edition, p. 44.

(p) L. R. 7 H. L. 653 (672).



Act : (4) they may be beyond the powers of the company. Of these the first three are illegal, and on that account void: but the last is void, not because illegal, but because, there being no power to do the act, the forms gone through which purported to perform it were inoperative, and the act, if done at all, was not done by the company, but by the person whose hand actually did it, and therefore neither brings the company under any liability nor gives it any right.

We thus see that the word illegality in its strictly legal sense is applicable only to those acts which are wrongful, without reference to the absence of legal power of the person doing them as distinguished from express

Application of the word illegality.

prohibition. An act may be wrongful by reason of prohibition or it may be wrongful by reason of its being opposed to public policy, or because it is tainted with fraud or crime, or because it is vitiated by duress or undue influence. These qualities have no reference to the absence of the legal power of the doer to do the act. The phrase *ultra vires* is applicable

Essence of the doctrine of *ultra vires*.

only to acts done in excess of the legal powers of the doer, as distinguished from want of jurisdiction and illegality. This may be called the essence of

the doctrine of *ultra vires*. It is action in excess of the powers possessed by a person (which includes a body corporate) within the above limitations.

In cases of individual citizens, what is not forbidden is permitted. In cases of Corporations, whatever is not permitted is forbidden.

This presupposes that the powers are in their nature limited. What is the nature of that limitation? In speaking of an ordinary citizen we do not speak of any action being *ultra vires*. To an ordinary citizen whatever is not expressly forbidden by the law is permitted by the law. It is only when the law has

called into existence a person for a particular purpose or has recognised its existence—such as the holder of an office, a body corporate &c. —that the power is limited to the authority delegated expressly or by implication and to the object for which it was created. In the case of such a creation the ordinary law applicable to an individual is somewhat reversed. Whatever is not permitted, expressly or by implication, by the constating instrument, is prohibited, not by any express prohibition of the legislature (q), but by the doctrine of *ultra vires*.

Decisions of the Court of Equity.

Thus, in the case of *Colman v. Eastern Counties Railway Company* (r), where Colman on behalf of himself

and other share-holders of the Eastern Counties Railway Company brought a suit against the company and the directors, (because they, the directors, for the purpose of increasing the traffic, proposed to guarantee a 5 per cent. dividend to the shareholders of an intended steam-packet company, who were to act in connection with the railway), to restrain the company from guaranteeing any such dividend, Lord Langdale, M. R., in

(q) *Attorney-General v. Great Eastern Ry. Co.*, L. R. 5 App. Cases 473.

(r) 10 Beav. 1 (14).

restraining the company from acting as they proposed to do, said: "I am clearly of opinion that the powers which are given by an Act of Parliament, like that now in question, extend no further than is expressly stated in the Act, or is necessarily and properly required for carrying into effect the undertaking and works which the Act has expressly sanctioned. How far those powers which are necessarily or properly to be exercised for the purposes intended by the Act, extend, may very often be a subject of great difficulty. We cannot always ascertain what they are. Unless the acts done can be proved to be in conformity with the powers given by the special Acts of Parliament, under which those acts are done, they furnish no authority whatsoever." Again: "Do the powers to construct, maintain, regulate the traffic, and do all that is necessary for the purpose of carrying on and working the rail-road, imply that the directors are to be at liberty to pledge the funds of the company for a completely different transaction, in the hope that it may turn out a profitable one, and by being itself profitable, add to the profits of the railway company? Surely there is nothing in the powers given by this Act of Parliament which can authorize that. I believe they have the power to do all such things as are necessary and proper for the purpose of carrying out the intention of the Act of Parliament, and they have no power of doing anything beyond it."

In the case of *Salomons v. Laing (s)*, where a Railway Company became lawfully possessed of shares in another Railway Company and they wanted to increase the number of their shares in order to control the working of the other Railway Company, it was held by Lord Langdale, M. R., that a corporation incorporated by Act of Parliament was bound to apply all the monies and property of the Company for the purposes directed and provided for by the Act, and for no other purpose whatsoever.

In *Bagshaw v. The Eastern Union Railway Company (t)*, a Railway Company, having power under several Acts of Parliament to make and purchase certain Branch Railways in connection with their main line, were, for those purposes respectively, authorized to raise the requisite capital by the creation of new stock. They were about to apply the funds so raised to the prosecution of works on their main line. Lord Cottenham, L. C., held that those who subscribed for the purposes specified by the Acts, had a right to have their monies applied to such purposes exclusively.

In *Munt v. The Shrewsbury and Chester Railway Company (u)*, where the company proposed to employ part of their capital to prepare, prosecute and promote a bill in Parliament, most closely connected with the interests of the company, the application of any of their funds for purposes not authorized by their Act of incorporation was held to be *ultra vires*. Lord Langdale re-affirmed the principle which he had laid down in *Colman v.*

(s) 12 Beav. 339 (352).

(t) 2 M' N and G, 389.

(u) 20 Law Journ: N. S. Chan. 169.

The Eastern Counties Railway Company (v), and held, "companies possessed of funds for objects which are distinctly defined by Act of Parliament, cannot be allowed to apply them to any other purpose whatsoever, however beneficial or advantageous it may appear either to the company or to individual members of the company."

In *Beman v. Rufford* (w), the directors having entered into a contract, the legality of which was doubtful, Lord Cranworth said: "I am clearly of opinion, on all the authorities, and all principles, that it is the province of this Court to prevent such an *illegal* contract from being carried into effect, because on the principle that has been so often laid down, this Court will not tolerate that parties shall lay out one farthing of their funds out of the way in which it was provided by the Legislature that they should be applied."

In *Attorney-General v. Great Northern Railway Company* (x), Kindersley, V. C., restrained the company from dealing in coal, holding that though an Act of Parliament constituting a Railway Company may contain no prohibition in express terms against the company's engaging in any business, there is in every such Act an implied contract to that effect. Even if the great body of shareholders agree to carry on a business different from that for which the company was constituted, a single shareholder has a right to say that it shall not be done.

The cases we have been discussing up to the present were all brought before the Court of Equity. They were all cases which dealt with Courts of Law. the misapplication or intended misapplication of the corporate funds. But the doctrine has been acted on in Courts of Law (as distinguished from Courts of Equity), to the extent of holding that a contract even under the seal of a company, cannot in general be enforced, if its object is to cause the corporate property to be directed to purposes not within the scope of the Act of incorporation.

Thus, in the case of *The East Anglian Railway Company v. The Eastern Counties Railway Company* (y), where the suit was on a contract under the seal of the defendant railway company to pay the expenses of the plaintiff company to promote certain bills in Parliament, the Chief Justice said: "The statute incorporating the defendant's company gives no authority, respecting the bills in Parliament promoted by the plaintiffs, and we are, therefore, bound to say that any contract relating to such bills is not justified by the Act of Parliament, is not within the scope of the authority of the company as a corporation, and is therefore void."

This case was afterwards recognised and acted on by the Exchequer Chamber, in the case of *Macgregor v. The Official Manager of the Deal and Dover Railway Company* (z).

- (v) 10 Beav. 1.
- (w) 15 Jurist 915.
- (x) 1 Dr. and Sm. 154.
- (y) 11 C. B. 775 (803).
- (z) 22 L. J. Q. B. 69.

In *Eastern Counties Railway Company v. Hawkes (a)*, the Lord Chancellor (Lord Cranworth) after reviewing all the cases decided by the Courts of both Equity and Law up to that time (1855) stated: "It must, therefore, be now considered as a well-settled doctrine that a company incorporated by Act of Parliament for a special purpose, cannot devote any part of its funds to objects unauthorized by the terms of its incorporation however desirable such application may appear to be."

Summarized by the House of Lords.

Now, if we consider the above cases carefully, we find that the doctrine is applied because the Corporation or the Company, as the case may be, has its legal existence for a particular purpose only, and that purpose is a creation of the law either expressly or by implication.

Why the doctrine is applied.

Lord Selborne in *Ashbury, &c., Co. v. Riche (b)*, observed as follows: "I say that a statutory corporation created by Act of Parliament for a particular purpose, is limited, as to all its powers, by the purpose of its incorporation as defined in that Act. The present and all other companies incorporated by virtue of the Companies Act, 1862, appear to me to be statutory corporations within this principle." Again: "I think contracts for objects and purposes foreign to, or inconsistent with, the Memorandum of Association are *ultra vires* of the corporation itself. And it seems to me far more accurate to say that the inability of such companies to make such contracts rests on an original limitation and circumscription of their powers by the law, and for the purposes of their incorporation, that it depends upon some express or implied prohibition, making acts unlawful which otherwise they would have had a legal capacity to do."

Observations of Lord Selborne.

It is principally in connection with corporations and joint-stock companies that we find the development of the doctrine of *ultra vires*. It is advisable therefore to consider at this stage the origin and growth of these forms of association.

Development of the doctrine.

Corporations existed in ancient Rome and were known as *Gildoe* or *Universitatis*; and a large part of Roman law is concerned with the regulation of trading companies and guilds.

History of corporations.

By the Roman law a corporation consisted of a number of individuals united by public authority in such a manner that they and their successors constituted but one person in law, with rights and liabilities distinct from those of its individual members. Cities, colleges, hospitals, scientific and trading associations, and societies for other public purposes could be so incorporated (c). They were generally authorised to make bye-laws for the administration

Roman Law.

(a) 5 H. L. Cases 331.

(b) L. R. 7 H. L. 653 (693)

(c) Digest 1, 8, 6 § 1.

of their own affairs, so far as they were not contrary to the law of the land or *their own special constitution*.

Corporations were known to the Common Law of England from very ancient times. We will discuss the nature and different varieties of corporations later on. The right to create corporations is a part of the royal prerogative. The king's consent, either expressly or impliedly, is absolutely necessary to the creation of any corporation. The king's implied consent is to be found in corporations which exist by force of (1) The Common Law, (2) Prescription, (3) Implication. The methods by which the king's consent is expressly given are either (4) By Charter or Letters Patent of the Crown passed under the Great Seal or (5) By Act of Parliament. By Act of Parliament, of which the royal assent is a necessary ingredient, corporations may undoubtedly be created (*d*); but it is to be observed, that till of late years most of those statutes, which are usually cited as having created corporations, do either confirm such as have been before created by the king; or, they permit the king to erect a corporation *in futuro* with specified powers. So that the immediate creative act was usually performed by the king alone, by virtue of his royal prerogative (*e*).

A corporation always risked forfeiture of its Charter for abuse of its franchises. A corporation had a definite object and its capacity was limited; and if it presumed to act outside them, it endangered its very existence (*f*). This is but the germ of the doctrine of *ultra vires* which has been so greatly developed by recent decisions.

From corporation to joint-stock companies of the present time was not any easy step. The Common Law only knew of a corporation or a partnership formed for the sake of sharing profits. It did not recognise companies which were neither corporations nor partnerships (*g*). The Courts treated as illegal any association for profit which attempted to arrogate to itself the privileges of a corporation (*h*). Joint-stock companies differed from corporations inasmuch as they did not obtain the sanction of the sovereign. They were created by the mere act and voluntary association of their members. They differed from partnerships inasmuch as the shares of a member could be transferred without the consent of the other members. There are other distinctions, but this is the principal difference. "Joint-stock companies have fund so extremely large and exercise powers so extensive and so materially affecting the rights and interests of other persons and the rights which the public or the subjects of Her Majesty have been accustomed to enjoy under the protection of the laws established in this kingdom, that to look upon a Railway Company in the light of a common partnership, and

(*d*) 10 Rep. 29.

(*e*) Blackstone's Commentaries Book I., p. 472 (15th Ed.)

(*f*) "I am of opinion that a corporation may be forfeited, if the trust be broken and the end of the institution be perverted." *Per* Holt, C. J., in *Rex v. Mayor & c. of London*, 1 Show 274 (280).

(*g*) *Macintyre v. Connell*, 1 Sim. N. S. 233.

(*h*) *Blundell v. Winsor*, 8 Sim. 601.

as subject to no greater vigilance than common partnerships are, would, I think, be greatly to mistake the functions which they perform, and the powers which they exercise of interference, not only with the public but with the private rights of all individuals in this realm" (i). Again, Lord Wensleydale in *Ernest v. Nicholls* (j), said: "It is obvious that the law as to ordinary partnerships would be inapplicable to a company consisting of a great number of individuals contributing small sums to the common stock. The Legislature then devised the plan of incorporating these companies in a manner unknown to the common law, with special powers of management and liabilities." But these companies soon began to force themselves upon the attention of the legislature and the judiciary.

It was only within the last century that joint-stock companies struggled into existence, and after much opposition were recognised and countenanced by the legislature. Every obstacle was placed in their way, and by the Bubble Act (k) it was attempted to put them down as nuisance. But, notwithstanding this statute, joint-stock companies increased both in number and importance. The Bubble Act was repealed in 1825. By the Act of 1825 (l), the Crown was empowered to grant charters of incorporation, and at the same time to declare that the persons so incorporated should be personally liable for the debts of the body corporate. At common law, the Crown, though it had the power to grant charters of incorporation by Letters Patent under the great seal, had no power to declare that the persons incorporated by them shall be personally liable like the members of a partnership. By 4 & 5 Will. IV c. 94 passed in 1834, the Crown was empowered to confer on a company, without incorporating it, the privilege of suing and being used in the name of a public officer. In 1844 (m), a General Act was passed enabling all companies (with some exceptions) to obtain from an office in London a certificate of incorporation without applying either for a charter or for an Act of Parliament. But by this Act the principle of limited liability in its fullest sense was not recognised. All the members of every one of such companies were liable to the last farthing for its debts. The liability of members was limited to a certain extent only; i.e., creditors could not proceed against them personally till they had satisfied the Courts that the company was not in a position to fulfil its obligations. It was only in the year 1855 (n), that an Act was passed enabling companies registered under the General

Came into prominence at the beginning of last century. The Bubble Act.

The Act of 1834

The General Act of 1844.

The principle of limited liability recognised since 1855.

- (i) *Colman v. Eastern Counties Railways Company*, 10 Beav. 1 (13).
- (j) 6 H. L. Cases 401 (418).
- (k) 6. Geo. I., c. 18.
- (l) 6 Geo. IV., c. 91.
- (m) 7 & 8 Vict., c. 110.
- (n) 18 & 19 Vict., c. 133.

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Act of 1844 (other than Insurance Companies), to obtain a certificate of incorporation. Subsequently, in 1856 and 1857 (*o*), almost all the previous statutes were repealed, and their most valuable provisions were consolidated, and extensive alterations of an entirely new character were introduced. The law was again codified in 1862. The doctrine of limited liability of persons associated together for the purpose of gain was for the first time fully recognised by this act (*p*), since which year companies have been governed by the Acts of Parliament which are now known as the Companies Acts, 1862 to 1900.

The Indian Companies Act of 1857 (*q*), followed the English Acts of 1856 and 1857 in almost every particular. The English Acts having been repealed by the codifying Act of 1862, the Indian legislature followed suit by passing the Indian Companies Act, 1866 (*r*). Between 1862 and 1882, several amending Acts were passed by the Imperial Legislature; so in 1882 (*s*) the Act of 1866 was repealed, and an Act was passed by the Indian Legislature embodying all the changes that had taken place in the meantime in the English Acts. The Companies (Memorandum of Association) Act was passed in 1895 (*t*), and this Act also resembles the English Act of the same name.

We have now briefly glanced through the history of corporations and joint-stock companies. We will now proceed to consider how the doctrine came to be a part of the legal system of England and hence of India. The doctrine is of modern growth.

The doctrine of *ultra vires* first began to take definite shape in cases upon acts done by railway and other companies formed under special Acts of Parliament. In fact, the decision, which first formulated the doctrine, was with reference to the *ultra vires* acts of a railway company (*u*). The great railway companies of England were being projected and developed about the first quarter of the last century. Almost immediately after these railway companies had been started, questions were raised as to the exact nature of the powers possessed by or granted to them. The very first case, in which the doctrine was prominently brought before the Courts and distinctly recognised as a guiding principle in the determination of ques-

tions relating to the powers possessed by companies, was *Colman v. Eastern Counties Railway Company* (*v*). We have already seen how the case arose (*w*). Lord Langdale, M. R., said as follows: "I think it right to

The first case in a Court of Equity :
Colman v. Eastern Counties Railway Company.

(*o*) 19 & 20 Vict., c. 47; 20 & 21 Vict., c. 14.

(*p*) 25 & 26 Vict., c. 89.

(*q*) Act XIX of 1857.

(*r*) Act X of 1866.

(*s*) Act VI of 1882.

(*t*) Act XII of 1895.

(*u*) In 1846.

(*v*) 10 Beav. 1.

(*w*) Ante. p. 6.

observe that companies of this kind possessing most extensive powers have so recently been introduced into this country, that neither the Legislature nor the Courts of Justice have been yet able to understand all the different lights in which their transactions ought properly to be viewed. We must, however, adhere to ancient general and settled principles, so far as they can be applied to great combinations and companies of this kind." Again: "We are to look upon those powers as given to them in consideration of a benefit which, notwithstanding all other sacrifices, it is to be presumed and hoped, on the whole, will be obtained by the public: But it being the interest of the public to protect the private rights of all individuals, and to defend them from all liabilities beyond those necessarily occasioned by the powers given by the General Acts, those powers must always be carefully looked into." In 1851, the Court of Common Pleas, following the decisions of the Courts of Equity, held that a railway company incorporated by Act of Parliament, cannot, even with the assent of all its shareholders, legally enter into a contract involving the application of any portion of its funds to purposes foreign to those for which it is incorporated (x).

From 1846 to 1855, i.e., from the time of the decision of the case of *Colman v. Eastern Counties Railway Company* (y), to that of the case of *Eastern Counties Railway Company v. Hawkes* (z), most of the cases were connected with railways, and naturally so. When the doctrine first came into prominence the railway companies, were the only large bodies of trading companies, having at their command very large capital and trying to engage in many speculations not authorized by their constituting instruments.

From applying the doctrine to the railway and other companies incorporated by Acts of parliament, to applying it to other joint-stock companies incorporated under the Companies Acts, was but a step, and the step was soon taken. We have seen that the Act of Parliament creating a company was looked upon as the instrument which limited the powers of the company. The Memorandum of Association of a company incorporated under the Companies Acts, was, as it were, the charter of such a company, and defined the limitation of the powers of a company to be established under the Acts (a). Lord Selborne in delivering judgement in *Ashbury &c. Company v. Riche* (b) said: "The Memorandum of Association is under that Act (meaning the Companies Act, 1862) their fundamental, and (except in certain specified particulars) their unalterable law; and they

(x) *The East Anglian Railway Company v. The Eastern Counties Railway Company*, 11. C. B. 775.

(y) 10 Beav. 1

(z) 5 H. L. Cases 331.

(a) *Per Lord Cairns*, L. C., In *Ashbury &c. Company v. Riche*, L. R., 7 H. L. 653 (668).

(b) L. R., 7 H. L. 653 (693).

are incorporated only for the objects and purposes expressed in that Memorandum. The object and policy of those provisions of the statute which prescribe the conditions to be expressed in the Memorandum, and make those conditions (except in certain points) unalterable, would be liable to be defeated in a contract under the common seal, which on the face of it transgresses the fundamental law, were not held to be void and *ultra vires* of the company, as well as beyond the powers delegated to its directors or administrators. I am unable to see any distinction for this purpose between statutory corporations under the Railway Acts, and statutory corporations under the Joint-Stock Companies Act of 1862."

The doctrine was called forth to prevent railway companies from acting beyond their powers. It was then by analogy applied to companies incorporated under the Companies Acts. From this, the next step was to apply the doctrine to all corporations created for a particular purpose. This was done in the case of *Baroness Wenlock v. The River Dee Company* (c), where the House of Lords held that the law laid down by the *Ashbury &c. Company v. Riche* (d), applied to all corporations created for a particular purpose, and not only to companies created under the Companies Act, 1862.

The doctrine of *ultra vires* having originated in the best interests of trade and commerce, has been applied to all bodies having powers delegated to them by law either expressly or by implication. It is in this sense that rules framed by the Court of Chancery or by the High Courts have been held to be *ultra vires*, if they in framing such rules have gone beyond their powers (e). The powers of subordinate legislatures are also derived from the instruments creating them. And, if in framing any law they should violate any of the powers, so laid down, such law will be held *ultra vires* of the legislature and thus null and void. In each case the powers are limited to the nature of the Act creating them.

From the history of the rise and progress of the doctrine of *ultra vires*, we see that it is another instance of judge-made law, that it is purely a creature of judicial decision. The legislature had not provided for it directly. We have seen that Lord Langdale in *Colman v. The Eastern Counties Railway Company* (ee) based his decision upon grounds of public policy and commercial necessity, to meet and provide for circumstances which called for the intervention of some strong hand. I cannot do better than quote the words of Kindersley, V. C., in *Attorney*

(c) L. R. 10 App. Cases, 334.

(d) L. R. 7 H. L. 653.

(e) Ante. p. 2-3.

(ee) 10 Beav. 1.

General Great Northern Railway Company (f), as to the reason of the creation of the doctrine. "Now, why has the rule been established, that railway companies must not carry on any business other than that for which they were constituted. It is because these companies being armed with the power of raising large sums of money, if they were allowed to apply their funds to purposes other than those for which they were constituted, might acquire such a preponderating influence and command over some particular branch of trade or commerce, as would enable them to drive the ordinary private trader out of the field, and create in their own favour a practical monopoly, whereby the interests of the public would be most seriously injured."

Another object of the creation of the doctrine was to protect shareholders by preventing their companies from engaging in hazardous enterprises, and thus dissipating the corporate funds (g). But the pith of the doctrine being "lack of power," even the unanimous consent of all the shareholders will not cure the defect. "I must, in the absence of any legal decision, say, that I consider that the acquiescence of all the shareholders in such transactions, afford no ground whatever for the presumption of their legality" (h). And herein, we may say, that corporations and joint-stock companies differ from partnerships. In a partnership, all the shareholders may combine together and engage in undertakings which were not contemplated by their deed of partnership. They may thus vary their constating instrument. But a joint-stock company except in certain particulars allowed by the Companies (Memorandum of Association) Act cannot do so (i).

And as a protection to shareholders.

Unanimous consent of shareholders does not cure defect.

The doctrine being once firmly established, its operation could not be controlled. Many consequences, undreamt of by the originators of the doctrine, followed in logical sequence. If all contracts made or purported to be made by a statutory person, beyond their powers were void, it followed that they could repudiate all such contracts. Thus, the well-known maxim of the Common Law that a man cannot stultify himself was abrogated in favour of the doctrine; and though, no individual will be allowed to plead want of authority in a suit on a contract entered into by him, a statutory person will always be allowed to take the defence that a contract is void because executed contrary to the provisions of its constating instrument (j).

Some logical consequences of the doctrine.

(1) Repudiation of contracts.

Corporation or joint-stock companies are incapable of mental expression

(f) 1 Dr. & Sm. 154 (159).

(g) *Attorney-General v. Great Northern Railway Company*, 1 Dr. & Sm. 154.

(h) *Colman v. The Eastern Counties Ry. Co.*, 10 Beav. 1.

(i) *Ashbury &c., Co. v. Riche*, L. R. 7 H. L. 653.

(j) *Hill v. Manchester and Salford Water Works Company*, 2B. & Ad. 544; *Balfour v. Ernest*, 5 C. B. (N. S.) 601.

except through recognised agents. The directors of a company are the agents through which it acts. But is the company bound by all the acts of the Board of Directors? What, if the Board exceeds its powers?

(2) Repudiation of acts of agents.

An act may be *extra vires* of the directors but *intra vires* of the company. Such acts may be cured by subsequent ratification by the company. Thus, in the case of *Irvine v. The Union Bank of Australia* (k), their Lordships of the Privy Council held, that borrowing by the directors of a joint-stock company in excess of the authority given by the Articles of Association was *ultra vires* of the directors, but it could be cured by subsequent ratification

Ratification.

by the company. But, if the directors enter into a contract which is *ultra vires* of the company, the Board will not then be recognised as the agents of the company; and the maxim, *Qui facit per alium facit per se*, although the basis of the law of principal and agent, will have no application. Corporations can be bound either by their own proceedings, or by those of their agents, within certain limits. Their authority is limited and regulated by the deed of settlement under which the corporation is constituted. Therefore, they cannot be bound by the acts of those directors who go beyond the powers of the corporation itself.

It was formerly held that the onus of showing that the governing body had authority to enter into the contract was upon the party alleging such authority. And the reason for the rule was apparently this: In the case of joint-stock companies, the legislature has provided that all the world should

Onus of proving authority.

have notice as to who were the persons authorised to bind all the shareholders, by requiring the co-partnership deed to be registered, and made accessible to all. The stipulations of the deed, which restrict and regulate their authority, are obligatory on those who deal with the company, and the directors can make no contract so as to bind the whole body of shareholders, unless they are strictly complied with (l). The case of *The Royal British Bank v. Tarquand* (m), lays down that everyone dealing with a corporation must be assumed to have knowledge of a deed of this description. The Court of Queen's Bench distinctly says that parties dealing with the directors of these joint-stock companies are bound to read the deed or statute limiting the directors' authority. Parke, B., in *Ridley v. Plymouth & Stonehouse Grinding and Baking Co.* (n), laying down the same doctrine observes: "The 7 & 8 Vict., c. 110, § 7 (o), provides that there shall be no complete registration of such a joint-stock company until a copy of their deed of settlement shall have been delivered to the registrar of joint-stock

(k) 2 App. 366.

(l) *Ernest v. Nicolls*, 6 H. L. Cases 401.

(m) 5 E. & B. 248; 6 E. & B. 327.

(n) 2 Ex. 711.

(o) The Companies Act of 1844.

companies. It is, therefore, competent to every person dealing with such a company to ascertain the objects of the company, for the deed must specify them, and also who the directors are, and any person may find in the deed the duties of the directors and their powers as between them and the company. Therefore, every person seeking to bind the company by a contract with the directors, must give some proof of their authority."

The Courts of India have simply been following in the footsteps of the Courts of England. Though the decisions of the English Courts are not binding on our Courts, still they offer a very valuable guide, especially with regard to a doctrine which may be said to be a special creation of the English Courts. Thus we find in *The matter of the Indian Companies Act, 1866, and of the Port Canning Land Investment &c. Company, Ltd. (p)*, Phear, J., laying down the law that if the directors of a joint-stock company engage in a business in which they cannot engage according to the plain meaning of the Memorandum of Association, whatever is done by the directors, as on behalf of the company, must be treated as having been done by them without authority, for their power, as agents of the company, did not extend thus far, and they could not acquire power to bind the company, *qua* company, from any conduct on the part of the shareholders. "An incorporated company has power to do everything which is not illegal or actually prohibited to it by the terms of its incorporation. This is true as regards the means of carrying into effect the purposes for which the company is incorporated. The principle does not apply outside that limit. The company is prohibited from engaging in undertakings which do not fall among the objects of its incorporation."

Courts in India follow English decisions.

In the matter of the Indian Companies Act, etc.

"The interests of the public on the one hand, and of the shareholders on the other, require that the directors shall be rendered powerless to use the strength and the means of the company, and to pledge its credit beyond the scope of them."

In the case of *Shamnuggur Jute Factory Co. Ltd. v. Ramnarain Chatterjee (q)*, the Court composed of Wilson & Porter, JJ., said: "The general principles of law applicable to this question are authoritatively laid down by the House of Lords in *Ashbury &c. Co. v. Riche (r)*, and *Attorney-General v. Great Eastern Railway Company (s)*. For the present purpose we think the result may be sufficiently stated by saying that the powers of a company depend upon its Memorandum of Association or other instrument of incorporation, and it can do nothing which that document does not warrant expressly or impliedly. A company, therefore, formed to carry on one

Shamnuggur Jute Factory Co. v. Ramnarain Chatterjee.

(p) 7 B. L. R., 583.

(q) I. L. R., 14 Cal., 189.

(r) L. R., 7 H. L., 653.

(s) L. R., 5 App., Cases 473.

trade cannot engage in another. But, on the other hand, this doctrine must be reasonably understood and applied. And a company, in carrying on the trade for which it is constituted, and in 'whatever may be fairly regarded as

incidental to, or consequential upon that trade,' is
Jehangir Modi v. free to enter into any transaction not expressly
Shamji Ladha. prohibited." In *Jehangir R. Modi v. Shamji Ladha*

(t), Sarjent, J., in delivering judgement said: "A long series of decisions of the Courts of Law and Equity in England had decided that an incorporated joint-stock company can do no act which is not expressly authorised by the Act of Parliament under which it is incorporated, or the deed of settlement of the company. It is, therefore, to the Memorandum and Articles of Association that we must turn to determine whether those transactions are expressly or impliedly authorised; or as it has been sometimes expressed, whether they fall within the scope of the objects for which the company was established.....By the objects for which a company is established are of course meant the operations to be carried out after the company is formed, and cannot refer to acts which precede the formation of the company, and which must *ex necessitate rei* have been performed before the company can be said to have an object at all, or at least to be capable of realising one." And further on, his Lordship speaks of the Articles of Association as the contract of partnership between the shareholders.

We notice in this case that his Lordship was inclined to place the same value on the Articles of Association as on the Memorandum of Association.

The Articles of Association do not define the objects
of the company, the Memorandum does. The
Memorandum of Association is unchangeable (except
as to certain particulars), but the Articles of Association can be changed by the shareholders. The

Memorandum of Association defines the scope, and the Articles of Association the procedure to be followed in carrying out the scope. An act done against the objects as laid down by the Memorandum of Association, cannot be cured even by the unanimous assent of all the shareholders. But an act done in contravention of the Articles of Association can be cured by the

ratification of the shareholders. "With regard to the
Articles of Association, those articles play a part
subsidiary to the Memorandum of Association.

They accept the Memorandum of Association as the charter of incorporation of the company, and so accepting it, the articles proceed to define the duties, the rights and the power of the governing body as between themselves and the company at large, and the mode and form in which the business of the company is to be carried on, and the mode and form in which changes in the internal regulations of the company may from time to time be made. With regard, therefore, to the Memorandum of Association, if you find anything which goes beyond the Memorandum, or is not warranted by it,

the question will arise whether that which is so done is *ultra vires* not only of the directors of the company, but of the company itself. With regard to the Articles of Association, if you find anything which, still keeping within the Memorandum of Association, is a violation of the Articles of Association, or in excess of them, the question will arise whether that is anything more than an act *extra vires* the directors, but *intra vires* the company (u)."

Again in the case of *Anandji Visram v. The Nariad Spinning and Weaving Company, Ltd.* (v), the Bombay High Court held: "The company is, so to speak, identified by its Memorandum of Association.

A person, therefore, who is asked to take shares in a projected company of which he is shown the Memorandum of Association, and consents to do so, does so upon the full understanding that the document shown him, or a true copy of it, will be registered as the Memorandum of Association. The company in which he agrees to take shares is the company to be incorporated by the registration of that document as its Memorandum of Association and no other company" (w). The judgment of the Court was delivered by Sarjent, J., but his Lordship had the advantage of having the case of *Ashbury &c. Co. v. Riche* (x) before him, which was not decided when he delivered judgement in *Jehangir R. Modi v. Shamji Ladha* (y).

Anandji Visram v. The Nariad etc. Co., Ltd.

To what classes the doctrine applies.

Statutes of Mortmain have no application in India.

The doctrine of *ultra vires* applies to corporations or such persons as are clothed with the characteristics of a corporation. Thus the Lord Chancellor of England is looked upon as a corporation *sole*, and so is a bishop. In the course of these lectures I shall try and confine myself, as far as possible, to such corporations or statutory bodies as we come across in India. There are many kinds of corporations recognised by the law of England but which do not exist in India. Thus we have no such corporation as a corporation recognised by the Common Law. Nor have we the great religious corporations of England, to suppress whose powers and covetousness the Statutes of Mortmain had to be passed. We have, no doubt, our great religious endowments, but the Statutes of Mortmain were never made applicable to them (z). The doctrine of *ultra vires* will not be made applicable as against them. The Mohunts or Mutwalis are simply trustees, and if they do an act which they are not empowered to do, it will be a breach

(u) *Per* Lord Cairns, L. C., in *Ashbury Railway Carriage and Iron Co. v. Riche*, L. R. 7. H. L. 653 (668).

(v) I. L. R. 1 Bom. 320.

(w) See also *In re Overend Gurney & Co.*, L. R., 2. H. L., 325 (369).

(x) L. R. 7 H. L. 653.

(y) 4 Bom. H. C. R., 185.

(z) *Mayor of Lyons v. East India Company*, 1 M.I. A., 175; *Attorney-General v. Stewart*, 2 Mer. 143; *Mitford v. Reynolds*, 1 Phil. 185; *Broughton v. Mercer*, 14 B. L. R., 442; *Sarkies v. Prosonnomoyee Dassee*, I. L. R., 6 Cal. 794.

of trust. They possess property on trust for the attainment and carrying into effect of the purposes for which they were originally created. They are consequently subject to the ordinary rules with respect to the enforcement of trusts. The consequences of *ultra vires* and breach of trust are exactly the same; but we arrive at the same conclusion from different processes of reasoning. In the latter case it is a breach of duty which is involved and which invalidates the proceeding. In the former case it is lack of power and, what is more, the Courts refuse to recognize anything like a trust relation as between a corporation and its members.

In India we have to deal with the powers possessed by the following bodies:

- (1) The Indian Legislature—it is a statutory body created by Act of Parliament with certain powers.
- (2) The Provincial Legislatures.
- (3) The Governor-General in Council. The Local Government.
- (4) The High Courts.
- (5) The Boards of Revenue.

[The last two bodies are often given powers to frame rules, &c., consistent with certain Acts of the Legislature. And, if in framing such rules they act beyond their powers, their acts are *ultra vires*].

- (6) Corporations, which may include
 - (a) District Boards.
 - (b) Municipalities.
- (7) Joint-stock companies.
- (8) *Quasi*-corporations.

In considering the powers of the above bodies we must consider how they came to be created and what powers they possess, expressly or by implication. What are the results of acts for the performance of which certain formalities, which have to be gone through, are not observed? For instance, a Local Government is given powers to extend the operations of an Act to local areas within its government, and certain things can only be done when the Act is extended to the area. If the Local Government prescribes the acts to be done before or at the time the Act is extended to the area, what will be the effect of the notification? Thus an order made by the Lieutenant-Governor of Bengal under the Bengal Irrigation Act of 1876 was published in the *Calcutta Gazette* on the 28th December, 1881, extending that Act to the district of Burdwan and providing that it should commence to take effect in that district on the 1st January, 1882. By a notification of the same date, purporting to be published under section 6 of the Act, the Lieutenant-Governor declared that the water of certain rivers and channels, including that of the river *Banka* in the district of Burdwan, would be applied by the Government for the purposes of the Eden Canal.

It was held that the notification purporting to be made under section 6 of the Act was *ultra vires* and of no legal effect, having been published before the Act was extended to the district of Burdwan and that the acts of the officers of Government under that notification with regard to the river *Banka* were without legal authority (a). Here the Local Government had power to extend the Act and had power also to declare that the water of the river *Banka* would be applied for the purposes of the Eden Canal. But simply because it did not observe the formalities required, the declaration was held to be null and void.

(a) *The Secretary of State for India in Council v. Nriya Gopal Audhtary*, I. L. R. 28 Cal., 487.

THE GENERAL NATURE, IMPORT AND PRINCIPLES OF THE DOCTRINE

In our introductory lecture, we discussed briefly the origin, import and scope of the law of *ultra vires*. The term was defined to mean any

Ultra Vires: act which is in excess of the powers of the person
Its various doing it (a). *Stricto sensu*, the term is applicable
significations. only to such acts of a corporate body as go beyond
the powers given to it, expressly or by implication, by its constating instru-
ments. But in actual practice this significance of the term is not adhered
to. At present, it is used in various senses, only two
Proper and improper meanings. of which are proper and the rest improper.

Several decisions have been already quoted to illustrate the primary meaning of *ultra vires*. We have seen that the sovereign can create, directly
Primary meaning. or indirectly, corporate bodies and give them definite
powers for the attainment of definite objects. So
long as they act within those powers for the attainment of objects for which
they were incorporated, their acts are perfectly valid. When however they
transcend those powers or engage in acts and transactions foreign to the
object of their incorporation, their acts and transactions are said to be *ultra vires*. It should be borne in mind that the said acts and transactions are
not, strictly speaking, illegal (though as a matter of fact the epithet illegal
is sometimes applied to them); they are *ultra vires* i.e., beyond authority.

This is the primary meaning of the term. There is another meaning
called secondary. Vice Chancellor Kindersley in *Earl of Shrewsbury v. North
Staffordshire Railway Co.* (b), recognised the two
Secondary meaning. senses when he says, "When you speak of *ultra vires*
of the company, you mean one or other of two things, either that you can
not bind all the shareholders to submit to it or that it is *ultra vires* in this
respect that the legislature, for instance, having authorized you to make a
railway, you cannot go and make a harbour."

Blackburn J., in *Taylor v. Chichester & Midhurst Ry. Co.* (c), after
quoting this passage, develops the distinction indicated therein and points
out the legal effects of the same. His view seems to be that the corporation
confers on its members certain rights and that it acts *ultra vires* when it over

(a) Vide supra.

(b) 35 L. J. (Ch.) p. 166 (172).

(c) L. R. 2 Ex. p. 356 (358).

rides the same, even when it acts within its powers or has the consent of the majority of the shareholders to its acts. Thus he says: "The rights thus conferred on the shareholders as between them and the corporation are very analogous to those between partners *inter se* and depend upon the nature of the terms on which the partners entered on the joint speculation. Any shareholder has a right to object to any act being done which is in contravention of the rights thus given him. Though the majority of the shareholders, or even all but himself approve, yet he has a right to object to the making or enforcing of any contract to do any unauthorized act which would affect his interests."

The distinction explained.

From this it will appear that whereas *ultra vires* in the primary sense has regard to the rights or powers of the corporation, what is *ultra vires* in the secondary sense has regard to the rights or powers of the individual persons who happen to be its members for the time being. The corporation is, in the eye of law, an entity quite distinct from the corporators. The rights and interests of the corporation are not identical with the rights and interests of the corporators. Now it may happen that an act which is within the potential powers of a corporation is not within its actual powers; and that it can exercise its potential powers in no other way than by overriding the right of one or more of the corporators. Such an act is not absolutely *ultra vires* the corporation, for it has the potential power to do it; yet it is *ultra vires* inasmuch as it ought not to so exercise its powers as to prejudice the rights of any of its individual members without the consent of the latter.

We come to this then, that in the case of an act which is *ultra vires* in the secondary sense, the corporation can do it with the consent of certain parties, but not in the absence of such consent; but that in the case of an act which is *ultra vires* in the primary sense, it can never do it. From this it would follow "that a shareholder may waive any right which is given to him for his own protection only, and if he has either expressly or tacitly done so, he can no longer object, and neither a stranger nor the body corporate itself can raise such an objection to a contract made by the corporation." (d).

Herein lies the importance of the distinction between what is *ultra vires* in the primary sense and what is *ultra vires* in the secondary sense. In the former case, generally speaking, the defence of *ultra vires* can be set up by all parties under all circumstances; in the latter, it can only be set up by certain parties (for example by an individual corporator whose rights are likely to be prejudiced by the intended act) under certain circumstances (if, for example, he has not waived his rights).

We have seen that the individual members of a corporation have certain rights which they may enforce against the corporation as also against third parties and that any act in contravention of these rights is *ultra vires*. Now

(d) Per Blackburn J. in *Taylor v. Chichester & Midhurst Railway Co.* L. R. 2 Ex. p. 356.

This point is discussed in *Miners' Ditch Co. v. Zellerbach* 37 California p. 543. See Brice on *Ultra Vires* p. 46.

it may be asked whether the recognition of *ultra vires* in this sense is anything more than the fact that the court would, under certain circumstances, prevent the majority of corporators from coercing the minority. Now, though in fact, quite a number of cases of *ultra vires* in the secondary sense are also cases of coercion of the minority by the majority, yet, strictly speaking, the two are quite distinct. There may be cases where there is no harsh or unfair treatment of the minority by the majority; and yet the court would interfere on the ground that the act or transaction in question is *ultra vires* in the sense that the corporation ought not to undertake it, there being opposition from one or more of its members. It seems, therefore, reasonable to recognise the secondary meaning of *ultra vires* as a distinct legal fact—distinct from cases of coercion of the minority by the majority, as also from other kinds of transactions which the court will not enforce on account of some informality attaching to them.

We shall now consider briefly the improper meanings of *ultra vires*.

Improper meanings. The term, as has been already stated, has come to be used somewhat indiscriminately. In fact there has been a tendency lately to describe any act which goes beyond authority as *ultra vires*.

1. As we shall presently see, the powers of those who act on behalf of corporations are defined and limited by the constating instruments. Acts which are in excess of powers so given to them are called *ultra vires*.

2. There are certain acts or transactions which no corporation can do or undertake. These are sometimes called *ultra vires*. For example, the issue of shares transferable by delivery before the English Companies' Act of 1867 was not permitted. Such issue of shares by directors of companies is called *ultra vires* (e). Similarly, payment of dividend out of capital is *ultra vires* (f).

3. The majority of corporators have, as a rule, the power to bind the minority. The courts however will restrain them if their conduct, on account of fraud or harshness or unfair treatment, is considered to be an abuse of power. Such abuse of power by the majority has been called *ultra vires*.

4. The powers of subordinate legislatures are defined and limited by their constitution. Any enactment in excess of their powers is *ultra vires* in the sense of being unconstitutional (g).

5. Where the executive authority of a State acts in excess of powers given to it by the legislature, directly or indirectly, it is said to act *ultra vires* (h).

6. And lastly, the acts of trade unions in excess of their powers have

(e) *In Re General Company for Premotion of Land Credit* L. R. 5 Ch. p. 363.

(f) *Towers v. African Tug Company* (1904) 1 Ch. p. 558. See also (1904) 2 Ch. p. 234; (1906) 2 Ch. p. 378.

(g) Cf. Dicey, "The Law of the Constitution" 7th Edition p. 97 vide supra.

(h) Instances of the *ultra vires* acts of subordinate legislatures as also of the executive will be discussed later.

been in a recent case described as *ultra vires*: for example, payments out of union funds for purposes not authorised have been restrained as being *ultra vires* (i).

The next question that arises in connection with corporate acts and transactions is: How does a corporation act or transact its business? Obviously it cannot act by itself: it can only act through and by means of certain real persons duly authorised to act on its behalf. Here two topics present themselves for discussion. One of them relates to the exact nature of the relationship that subsists between the corporation and its officials: the other to the requisites and provisions which should accompany the acts and transactions of a corporation and which assure the world that they are its genuine acts and transactions. Under the first head, we shall have to treat of the law of agency as modified in its application to corporate bodies, and under the second, of formalities.

The officials of a corporation are generally described as its agents, but they are not agents in the same sense as the members of a partnership concern are agents of each other. In the latter, a partner has a general authority to bind his co-partners in respect of all acts and transactions coming within the scope of the partnership business. The officials of a corporation, on the other hand, have their authority limited by the instruments which authorise them to act on behalf of the corporation. Hence it follows that they cannot bind the company in respect of acts and transactions which go beyond their powers or which are not incident to the legitimate exercise of the same. They may make themselves liable, but not the corporation: and those who deal with them should look to them, but not to the corporation. The latter are bound to consult the instruments which authorise the officials. If they do not, it is their own fault.

These points were settled by Lord Wensleydale in the case of *Ernest v. Nicholls* (j). After pointing out that the law as to ordinary partnerships would be inapplicable to a company consisting of a great number of individuals, his lordship goes on to observe: "The legislature then devised the plan of incorporating these companies in a manner unknown to the Common Law with special powers of management and liabilities, providing at the same time that all the world should have notice who were the persons authorised to bind all the shareholders by requiring the co-partnership deed to be registered, certified by the directors and made accessible to all.

All persons, therefore, must take notice of the deed and provisions of the Act. If they do not choose to acquaint themselves with the powers of

(i) *Parr v. Lancashire & Cheshire Mines Federation* (1913) 1 K. B. p. 6.
 (j) 6 H. L. C. p. 419. See also *Smith v. Hull Glass Co.* 11 C. B. p. 897, (926-7): *Re County Life Assurance Co.* L. R. 5 Ch. 288, *Fountain v. Carmarthen Railway Co.* L. R. 5 Eq. p. 321. *Mahony v. East Holyford Mining Co.* L. R. 7 H. L. p. 893. *Greenwood's Case*. 3 De G. M. & G. p. 459. *Re Norwich Fire Assurance Society*. 58 L. T. p. 38.

the directors it is their own fault, and if they give credit to any unauthorised persons they must be contented to look to them only and not to the company at large.”

Two points are made clear in this judgment. (1) A joint-stock company resembles a partnership in certain respects, but the members of the former cannot bind each other or the company, as those of a partnership. Only those who have authority to do so can. (2) This authority is not a general authority as of a partner in a partnership, but is limited, and those who deal with the company are bound to take notice of the limitations. *Mutatis mutandis*, these remarks would apply to corporations in general.

Formalities are requisites or provisions which accompany the acts and transactions of corporations. They are meant to serve two purposes:

Formalities. (1) they protect the interests of the corporation and its members against the negligence and misdeeds of its agents or officials; (2) their presence indicates to the outside world that the acts and transactions purporting to have been entered into on behalf of the corporation by persons claiming to represent it are the acts and transactions of the corporation itself and not of the said persons in their individual capacity. They are generally classed under three heads: (1) discretionary, (2) directory and (3) imperative.

Discretionary. Discretionary formalities are those which the officials of the corporation may comply with at their own discretion, but for the omission of which they are not held responsible.

Directory. Those are directory which the corporation can compel its officials to employ or comply with, but as they do not form an essential part of any transaction, their omission does not, by itself, invalidate the transaction.

Imperative. As distinguished from the first two are the imperative formalities which form an essential part of the transaction and the absence of which, generally speaking, renders the transaction void and inoperative. This important distinction between imperative and directory formalities is very well brought out in *Norwich Yarn Co. Limited—Ex parte Bignold (k)*.

“In examining the deed for this purpose, it is important to bear in mind an important distinction pointed out by Sir James Wigram in *Foss v. Harbottle* (2 Hare 461) and followed in subsequent cases that the forms prescribed by a deed of incorporation for the government of a company are of two sorts, some are imperative, but others are only directory; some in fact are of the essence of the contract and everything done in violation of it is void, others are merely directory and point out the modes by which the objects of the undertaking are to be accomplished.”

Having pointed out the distinction between the three kinds of formalities we shall now proceed to deal with directory formalities in greater detail.

(k) 22 Beav. p. 143.

As regards those formalities which are clearly directory, the principle of law is that their omission in a transaction does not invalidate the same and cannot be successfully set up as a defence in an action brought against the corporation to enforce claims arising out of the transaction, provided that the person dealing with the corporation has no notice (actual or constructive) of the informality in question. This was decided in *Royal British Bank v. Turquand* (l).

How far directory formalities affect corporate acts and transactions.

In this case, the plaintiff brought an action to enforce the payment of £1000/- borrowed by the directors of a company on a bond in the name and under the common seal of the company. The directors were authorised by the deed of settlement to borrow on behalf of the company "such sum or sums of money, as shall, from time to time, by a resolution passed at a general meeting of the company, be authorised to be borrowed." The company resisted payment on the ground that no resolution of any general meeting of the company was at any time passed authorising the making of the bond. It was held by Lord Campbell "that the bond cannot be rendered illegal and void from any irregularity in the proceedings of the company, nor even by an excess of authority, the plaintiff having acted with good faith and the shareholders not being prejudiced." The case was referred to the Exchequer Chamber. Jervis C. J. in affirming Lord Campbell's judgment said that the directors having an authority under the deed of settlement to borrow in the name, and under the common seal of the company, the plaintiffs, the creditors, had a right to infer that the former had done all such acts (viz, resolutions and so forth) as were necessary for making that authority complete for the legitimate exercise of the same.

Here the passing of a resolution by the company prior to the directors' exercise of their power to borrow is a directory formality. The court held accordingly that its omission did not render the borrowing transaction invalid as against creditors who had acted in good faith.

It would be instructive to compare this case with *Irvine v. The Union Bank of Australia* (m), the facts of which are as follows:—By the deed of settlement of a company it was provided that the directors' power to borrow should not exceed a certain amount, though the power could be extended by the vote of one half of all the shareholders at a general meeting. The

(l) *Royal British Bank v. Turquand* 5 E. & B. p. 259. 6 E. & B. pp. 331-2.

See also *County of Gloucester Bank v. Rudry Merthyr Steam & Home Coal Colliery Co.* (1895) 1 Ch., 629; *In Re Hampshire Land Co.* (1896) 2 Ch. 743. *In Re Land Credit Company of Ireland, ex parte Overend, Gurney and Co.* (1869) L. R. 4 Ch. 460. *In Re County Life Assurance Company* (1870) L. R. 5 Ch. 288. *Mahony v. East Holyford Mining Company* (1875) L. R. 7 H. L. 869. *In Re Scottish Petroleum Company* (1883) 23 Ch. D. 413. *Biggerstaff v. Rowatt's Wharf Limited* (1896), 2 Ch. 93. *In Re Bank of Syria* (1900) 2 Ch. 272. (1901) 1 Ch. 115. *Shaw v. Port Phillip Gold Mining Company* (1884) 13 Q. B. D. 103. *Ruben v. Great Fingall Consolidated* (1904) 1 K. B. 650, also I. L. R. 36 Bom. 564.

(m) 2 A. C. 366.

See also *Grant v. United Kingdom Switchback Ry. Co.* 40 Ch. D. 135 (139).

directors borrowed from time to time sums which exceeded the amount fixed by the deed of settlement. The court on being satisfied that no resolution had been passed prior to the borrowing transactions extending the directors' power to borrow, nor there being any subsequent ratification of the same, held that the plaintiffs were not entitled to recover. Sir Barnes Peacock in giving the judgement of the court said: "This case should be distinguished from *Royal British Bank v. Turquand*. In that case Chief Justice Jervis remarked that the lender finding that the authority might have been made complete by a resolution had a right to infer the fact of a resolution.

In the present case however the Bank would have found that by the Articles of Association the directors were expressly restricted from borrowing beyond a certain amount, and they must have known that if the general powers vested in the directors had been enlarged by a resolution, a copy of that resolution ought in regular course to have been forwarded to the Registrar of Joint Stock Companies in pursuance of sec. 153 of the Companies' Act and would have been found among the records."

The *ratio decidendi* in *Irvine v. The Union Bank of Australia* seems to be that as the directors were expressly forbidden to borrow beyond a certain amount, unless their power had been previously enlarged by a resolution of the shareholders which would in due course find its way into the records of the Registrar's office, the plaintiffs were under an obligation to enquire whether in fact any such resolution as aforesaid had been passed and that having failed to do so, they had been affected with constructive notice of the informality, even though they had no actual notice of the same.

The two cases cited above have made the law as regards the liability of corporations in respect of transactions which are informal owing to the omission of a directory formality fairly clear. The courts will not allow a corporation to go scot free merely because some provision or other relating to its internal management or concern had been omitted. On the other hand, they would hesitate to give relief to a person dealing with the corporation who had knowledge of the informality and whose duty it was, therefore, to get the same rectified by bringing it to the notice of the members of the corporation. The courts have a duty towards the public as well as towards the members of the corporation, and the whole law on the subject of formalities, as we shall see, is based on a recognition of this double duty.

The omission of a directory formality, we have seen, does not affect the rights of third parties dealing with the corporation in good faith. But

the law on this point goes further. Where the omission of the directory formality in a transaction has been ratified or acquiesced in by those who are competent to act on behalf of the corporation, the latter will be estopped from setting up the informality as an answer to any claim arising out of the transaction. Here the question whether or not the other party to the transaction was aware of informality is immaterial. Mere ratification or continued acquiescence (provided it does not amount to a

Omission of directory formalities may be cured by ratification.

fraud upon the corporation) serves as a waiver of the informality. The leading case on this point is *Bargate v. Shortridge* (n).

By the deed of settlement the shareholders of a banking company were not allowed to transfer their shares except upon notice to the directors and on the consent thereto of a Board of Directors. Such consent had to be signified in writing signed by three directors at the least. Shortridge, one of the shareholders, transferred at different times, his shares to different persons. He sent proper notice to the directors and received back consent signed by the directors on which he made the transfers. Afterwards the bank got into difficulties and the directors as well as the creditors sought to impeach the validity of the transfers on the ground that the certificates of consent were not in fact signed by a Board of Directors as required by the deed of settlement. The decision of the House of Lords was that the transfers were valid. "The question is", said Lord St. Leonards, "whether or not a long course of dealing by a corporation, contrary not to the real interests of the company or the bona fides of the transaction, but contrary to some of the terms of the deed under which the company was formed, shall or shall not be held to disentitle such company to object to the particular rights, acquired by that course of dealing, as acquired in disregard of the deed of settlement". The deed required that consent should be given in a particular form. But the directors having disregarded it not only in their dealings with Shortridge but also from the very foundations of the company could not impeach the validity of the transactions they had entered into.

There remains one more question to deal with viz:—What are directory formalities? From what has been already stated it will appear that formalities dealing with the internal arrangements and proceedings of a corporation are, generally speaking, construed as directory. Such formalities relate to the calling of meetings of corporations; serving of notices of such meetings; passing of resolutions by them; mode of doing business by officials; signing of documents by them; getting the consent of any particular official prior to the affixing of the common seal and so on.

What are directory formalities?

As regards some of these matters, the necessary formalities are laid down by the constituting instruments. But the public can have no knowledge as to whether in every case they have been complied with. They have a right to assume that every thing has been done *et modo and forma*. Hence, as we have seen, their absence does not vitiate the transactions. There are other formalities beside these, which are known only to the officials of the corporation and perhaps also to its members. A *fortiori*, their omission does not render any transaction invalid.

In *Montreal and St. Lawrence Light and Power Company v. Robert* (o),

(n) 5 H. L. C. p. 297. 24 L. J. (Ch.) p. 457.

See also *Murray v. Bush* L. R. 6. H. L. 37.

Re Royal British Bank, Walton's Case. 26 L. J. (Ch.) 545

(o) L. R. (1906) A. C. p. 196 (203).

the company tried to set aside a purchase on the ground that the resolution of the directors which authorized the completion of the purchase had been passed by an insufficient quorum. It was held that the purchase, being *ultra vires*, after the lapse of a specified time, became absolute. Lord Macnaughten in delivering the judgment of the court said: "It is quite true that the bye-laws require the presence of three directors to make a quorum and only two attended on the 17th. But after all the bye-laws of a company are not public property. They concern matters of internal management. Those who deal with them have no means of access to them. There was nothing to put Robert on inquiry. The officials of the company furnished him with a copy of a resolution which purported to be a resolution of the directors duly and regularly passed. On the faith of that representation Robert altered his position and parted with his property. The company cannot now be heard to say to the vendor, "you should not have given credit to what our people told you." If such a plea were listened to, no one would be safe in dealing with a company having private regulations of its own, inaccessible to the outside world, to which appeal could be made in case of need, to relieve it from solemn obligations or save it from a bad bargain."

We now come to the subject of imperative formalities. Formalities are means devised by the legislature or by the corporation itself for the purpose of protecting its interests. They are of the nature of restrictions imposed upon its officials to prevent them from rushing into hasty and unfortunate transactions. Who is to suffer if the officials do not take care to observe them? Several decisions have been quoted to show that in the case of directory formalities third parties with no knowledge of the informality can enforce informal acts and transactions in their favour. But this they cannot do if the formality is construed by the court to be an imperative one. The question, then what is an imperative formality is a very important one. The courts in deciding it have had to keep the balance even between two complicating acts or interests: (1) those of the corporation, and (2) those of the public at large; and it is not easy to say how far it has been successful in its attempt. A careful perusal of the numerous decisions which have turned on this point would lead one to conclude that no general proposition can be laid down which would unmistakably guide us in every case in distinguishing between an imperative formality and a directory one. The courts have taken the facts of each case into consideration and have tried to give a decision consonant with the principles of law and equity. Still the following propositions may be tentatively enunciated.

First, it may be laid down that if the constating instrument of a corporation, whether a deed of settlement or a legal enactment, special or general, states definitely that certain formalities must be observed in connection with transactions of a certain class, courts will construe the same as imperative. A series of decisions illustrate this proposition.

Express formalities.

In *Homersham v. Wolverhampton W'works (p)*, the company was exempted from making payment in respect of work done in excess of and outside the contract which was under seal, on the ground that there had been no contract in respect of such extra work in terms contemplated by the general and special acts which governed the company.

In *Leominster Canal Co. v. Shrewsbury etc. Railway Co. (q)*, an agreement on the part of the defendant company to purchase the canal of the plaintiff company was not enforced on the ground that the agreement was not under seal or signed by two directors of the railway company as required by the 97th. section of the Companies' Consolidation Act (8 & 9 Vic. c. 16). This was exceptionally hard on the plaintiff company, as on the faith of the agreement they had withheld their bonafide opposition to an Act of Parliament in favour of the defendant company and had themselves obtained an Act authorising the sale and purchase of the canal and had made certain payments by way of part-performance.

So in *Kirk v. Bell (r)*, the deed of a joint stock company required that the directors should not be more than seven or less than five, and that three or more should constitute a Board and be competent to transact all ordinary business. In course of time, the number of directors was reduced to five. Four of them executed a deed compromising a large debt due to the company in lieu of a certain mining concern and covenanted with the debtor to indemnify him against certain Bills of Exchange. The debtor brought an action against the company for not indemnifying him. It was held that the covenant was not binding on the company, for the transaction in question was not ordinary business and no smaller number than five was competent to put it through.

The doctrine of imperative formalities assumes special importance in the case of formalities imposed by the legislature in mandatory language. If the legislature declares that some business or transaction should be done in a particular manner and lays down the various steps of procedure, the courts require strict adherence thereto. In the absence of such adherence, the transaction is void and the corporation, however just may be the demands against it, may be exempted from satisfying them. Thus in *Hanson and another v. Corporation of the Village of Grand Mere (s)*, where the respondent corporation had guaranteed debentures to a certain amount to be issued by a company by a bye-law framed under the Towns Corporation Act, (C. I. tit. II Revised statutes of Quebec, 1888) it was held that the bye-law was *ultra vires*, inasmuch as it had not been submitted to the municipal electors for their sanction nor to the Lieutenant-Governor, as it should have been under the provisions of the Act. The legislature required that the

Formalities imposed
by legislature.

(p) 6 Exch. 137. 20 L. J. (Ex.) 193.

(q) 3 K. & J. 654. 26 L. J. (Ch.) 764.

(r) 16 Q. B. 290.

(s) L. R. (1904) A. C. p. 789.

bye-law in question should have been approved by the majority of the whole body of ratepayers and sanctioned by the Lieutenant-Governor. As it was admitted that the bye-law was not even submitted to the electors for their approval or to Lieutenant-Governor, the Judicial Committee of the Privy Council decided that the bye-law was *ultra vires* and the guarantee in operative.

Suppose, however, that, in fact, the bye-law was submitted to the electors, but that the authorities did not observe all the formalities which the legislature had laid down in relation to such submission, would the informality render the bye-law void? Brice on the strength of decisions of the United States courts is inclined to think that the latter formalities are merely directory and that their non-observance would not render the whole transaction void. "Thus if the legislature provides, in addition to obtaining a vote, holding meetings etc., certain formalities as to time, place, or manner of obtaining such vote, &c. these additional requisites will—at least as regards innocent parties—be deemed discretionary, provided the vote has been *defacto* taken, the meeting held, &c." (t).

Municipalities and similar public bodies are charged to enter into certain classes of contract under certain formalities. These formalities are generally construed as imperative and their absence renders the contract void. The courts have gone so far as to hold that in a contract where there has been omission of an imperative formality, the Municipality can be charged with no liability whatsoever, even in respect of work done by the other party in pursuance of the contract.

Section 174 of the Public Health Act of 1875 requires that every contract made by an urban authority, whereof the value or amount, exceeds £50 must be in writing and sealed with the common seal of such authority. In the case of *Young & Co. v. The Mayor etc. of Royal Limington Spa* (u), an engineer had done certain works for the corporation, but there was no contract according to the provisions of the section. It was contended on behalf of the plaintiff that as the contract had been performed by the plaintiff and the defendants had the benefit of plaintiff's work, labour and materials, the defendants at all event were liable to pay a fair price. Lindley L. J. in overruling the contention observed as follows: "In support of this contention cases were cited to show that corporations are liable at Common Law *quasi ex contractu* to pay for work ordered by agents and done under their authority We have here to construe an Act of Parliament..... But contracts for more than £50 are positively required to be under seal, and in a case like that before us, if we were to hold the defendant liable to pay, for what has been done under the contract, we would in effect be repealing the Act of Parliament and depriving the ratepayers of that protection which Parliament intended to secure for them" (v). In India Municipalities, District Boards

(t) *Ultra Vires* pp. 610-1.

(u) (1883) L. R. 8 App. Cas. 517.

(v) L. R. 8 Q. B. D. p. 579 at p. 585. See also *British Insulated Wire Company Ltd. v. The Prescott Urban District Council* L. R. (1895) 2 Q. B. p. 463.

etc. are allowed by statute to enter into certain kinds of contracts under certain formalities. Our courts, following the decisions of English judges, have construed them as imperative and held their absence to vitiate the contract *ab initio* (w).

We have said that the terms imposed by legislation in mandatory language are construed as imperative. We may go further and say that the terms or provisions imposed by the constating instruments of a corporation, though not contained in any legislative enactment, would be held by the courts to be imperative, provided the language is mandatory. *Herben v. Phillips* (x) is a case in point. There by the Articles of Association of a company it was provided that a share holder could vote by proxy. But there was a provision which required that the instrument appointing the proxy should be attested. Chitty J. held that this provision was not merely directory, but that attestation goes to the validity of a proxy, and that proxies who are not attested were invalid. (y)

The corporation has got the right under certain conditions to deprive its members of their rights, interests and franchises in the corporation. While exercising such a right, it is absolutely incumbent on the corporation to comply with all requisites and provisions laid down either by the legislature or by its own constating instruments or by any rules of procedure which it has framed for its own guidance and for that of its members. The courts construe formalities for the purpose of effecting a forfeiture as strictly imperative. As James, L. J., says: "It was the established case of the Court of Chancery that no forfeiture of property could be made unless every condition precedent had been strictly and literally complied with. A very little inaccuracy is as fatal as the greatest. Here the notice is inaccurate. It is therefore bad, and the forfeiture invalid."

The principle stated above has been followed in a large number of cases. In many of them a very slight inaccuracy or omission has been considered fatal. Thus in *Watson v. Eales* (z), a forfeiture of shares was set aside on

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- (w) See *Radhakishan Das v. The Municipal Board of Benares* I. L. R. 27 All. p. 592.
Ramaswami Chetty v. Municipal Council of Tanjore I. L. R. 29 Mad. p. 360.
Abaji Sitaram v. Trimbak Municipality I. L. R. 28 Bom. 66.
Ahmedabad Municipality v. Submanji I. L. R. 27 Bom. 618.
Chairman South Barrackpur Municipality v. Amulya Nath Chatterjee I. L. R. 34 Cal. 1030.
- (x) 23 Ch. D. p. 14.
- (y) The question as to what language is mandatory is not easy of answer. The following cases may be referred to:
Kerr v. Corporation of Preston 6 Ch. D. p. 463.
Julius v. Bishop of Oxford 5 A. C. p. 214.
Liverpool Borough Bank v. Turner 2 De G. F. & J., p. 502.
Re. General Provident Assurance Co. 38 L. J. (Ch.) 320. *Caldow v. Pixell* 2 C. P. D. p. 567.
Howard v. Bodington 2 P. D. p. 203.
Hughes v. Sutherland 7 Q. B. D. p. 160.
Batthyany v. Bouch 50 L. J. (Q. B.) p. 421.
William's claim—Re Great Eastern Steamship Co. 53 L. T. p. 594.
Black v. Williams (1895) 1 Ch. p. 408.
- (z) 23 Beav. 294. Compare L. R. (1910) A. C., p. 317.

the ground that a notice to forfeit "on Monday the 7th" was insufficient, as the 7th was a Friday. In *Cockerell v. Van Diemen's Land Co.* (a), a forfeiture was declared bad in as much as no notice of forfeiture was left for the shareholder at his usual or last place of abode within the meaning of the Act which governed the company. In *Johnson v. Lyttle's Iron Agency* (b), a forfeiture was held invalid, on the ground that the notice of forfeiture claimed interest from the date of the call, instead of from the date fixed for payment.

In *Bottomley's Case* (c), where the articles provided that the business of the company should be conducted by not less than a specified number of directors, it was held that a forfeiture made on non-payment of a call, by less than the specified number was invalid.

So in *New Chile Gold Mining Co.* (d), a former shareholder whose shares had been forfeited for non-payment of calls was allowed to prove for damages in the subsequent liquidation of the company in as much as the directors had not given him any notice that if he failed to pay on or before the day appointed for payment, they might forfeit his share.

Effect of neglecting
imperative forma-
lities.

The effect of the omission of imperative formalities is much the same as that of *ultra vires* transactions.

First, no suit will lie on the transaction itself as it is void *ab initio*. But if one of the parties has received any benefit under it, he might be made liable to account for it, or if third parties have acquired rights under it, they might be entitled to relief on equitable principles (e). Again, the absence of a formality in a transaction will render it void, but only to the extent of the formality in question. Thus an instrument executed by the corporation may be void as a mortgage or a charge owing to the omission of a formality. Yet it may be binding as a bond (f). And similarly a bond may be void through some informality, but an action will lie on the debt (g).

(a) 1 C. B. (N. S.) 732.

(b) 5 Ch. D. 687.

(c) 16 Ch. D. 681.

(d) 45 Ch. D. 598.

(e) *Re Romford Canal Co.*, 52 L. J. (Ch.) 729.

But see *Young & Co. v. The Mayor of Royal Leamington* (1883) L. R. 8 App. Cas., 517.

British Insulated Wire Company, Ltd. v. The Prescott Urban Council (1895) 2 Q. B., 463.

Also *Radha Kissen Das v. The Municipal Board of Benares*, I. L. R. 27 All. 592.

Ramaswamy Chetty v. The Municipal Council of Tanjore, I. L. R. 29 Mad. 360.

Govind Chandra Dutt v. Chairman of Howrah Municipality, (Special Appeal No. 1828 of 1891, decided on the 5th of June 1894).

(f) *Re Romford Canal Co.* 52 L. J. (Ch.) 729. But see also *Scott v. Colburn*, 26 Beav. 276; *McMasters v. Reed*, 1 Grant's cases, 36.

(g) *D'Arcy v. Tamar. &c., Ry. Co.*, L. R. 2 Ex. 158 at p. 162 per Bramwell, B. *Kipling v. Todd*, 3 C. P. D., 350.

Secondly, though it has been asserted that mere lapse of time does not disentitle the suffering party to an equitable relief, yet there may be such a delay followed by such a change of circumstances that it would be inequitable to set aside the transaction unattended by the requisite formalities (h).

And lastly, systematic disregard of imperative formalities may be considered a good reason for upholding informal transactions. This was the point of decision in *Walter's case*. The deed of settlement of the company laid down that, in the case of transfer of shares, certain formalities should be complied with, otherwise the transfer would have no force either in law or in equity. Fifty shares belonging to the company were transferred and accepted by the transferee but none of the above formalities were complied with except that an entry of the transaction was made in the share ledger of the company. The Vice-Chancellor in giving judgment said: "The formalities required by the deed may not have been, and I assume them not to have been, strictly attended to, or wholly carried into effect; but, throughout all the transactions.....the requisitions and conditions of the deed were (I may say) systematically disregarded.....There must be taken to have been an universal assent, as it seems to be, to disregard its provisions." It was held accordingly that the transferee should be placed on the list of contributories (i).

The corporation as we have said more than once acts through its agents. Of these, there are some who are entrusted with the control and management of the affairs of the corporation. They are styled variously as directors, commissioners, trustees and so forth. In the execution of their work, they are required to comply with various kinds of formalities laid down either by an Act of the Legislature, general or special, or by custom or by their constating instruments. We shall not enter into this subject here as it will be dealt with in a subsequent chapter.

Formalities relating to the managing body.

In our treatment of directory formalities we saw that their omission could be cured by ratification. What is ratification?

Ratification.

We shall now go into this subject somewhat fully.

By ratification is meant the act or acts by which a person on whose behalf an act has been done without his authority adopts it as his own. Its principles are as old as any proposition known to law, and are applicable to individuals and corporations, regard being had to the limited capacities of the latter. Ratification may be either *express* as, for example, when the shareholders assembled in a meeting pass a resolution approving

Express.

an unauthorised act of its directors: or *implied*. A ratification is said to be implied when it is not expressly made by those who are competent to make it, but may be reasonably inferred from their conduct. For example, when

Implied.

(h) *Re Florence Land & Public Works Co. Nicol's Case*, etc., 29 Ch. D., p. 421 at pp. 429, 435, 436 Per Chitty. J.

(i) *Walter's Case-Re Vale of Neath, &c.*, 3 De G. and Sm. 149 at 156. See also *Bargate v. Shortridge*, 5 H. L. C., 297.

the shareholders have notice (actual or constructive) that an irregular or unauthorized transaction has taken place and take no steps to repudiate it, the courts will construe their silence and acquiescence in the irregularity as amounting to a ratification. This was established by *Phosphate of Lime Company v. Green* (j).

By its articles of association, the *Phosphate of Lime Co.* was expressly prohibited from purchasing their own shares. The defendants who had bought four hundred shares, being unable to take them up, borrowed £6500 from the company. When called upon to repay this amount, they entered into an agreement with the directors by which the latter accepted the four hundred shares, which they thereupon cancelled in satisfaction of the debt and gave them a discharge. At a meeting of the shareholders held subsequently it was agreed that the company should go into liquidation and its business be transferred to a new company with a reduced capital. At this meeting an account was handed round in which the sum of £4000 was set down as the price of the shares cancelled and the account of the defendants was credited with £4000 as per shares' forfeited account. In an action brought by the liquidator of the old company for the recovery of the £6500, it was held that the shareholders had by their acquiescence ratified what they had done in as much as the shareholders in assenting to the transfer of the old to the new company had knowledge or the opportunity or means of knowledge that such transfer was in part based upon the cancellation of the 400 shares.

As to what would amount to an implied ratification, Brett, J., said: "Now in order to establish a case of ratification, it seems to me not necessary to prove absolute knowledge on the part of the shareholders.....It was sufficient to show that facts were made known to the shareholders, into the effect of which they might and ought to have inquired and to which they ought to have objected at the time, unless they intended to adopt the transaction" (k).

From the passage quoted above, it is abundantly clear that for purpose of implied ratification, actual knowledge of the transaction in question is not necessary. If the shareholders are in possession of the means of knowledge, that is, knowledge of such facts as would, if followed up, lead them to the actual knowledge of the transaction, they would be held to have ratified the same, if they did not take, in time, any steps to repudiate it. But it should be borne in mind that to hold the shareholders responsible, it is not enough to prove that they knew that certain transactions, which in fact were irregular or unauthorised, had taken place: it must be proved further

(j) L. R. 7=C. P., 43.

See also *London Financial Association v. Kelk* 26 Ch. D. p. 107 at p. 152. *H. Tung v. Man on Insurance Co. Ltd.*, (1902) A. C., 232.

(k) L. R. 7=C. P. 43.

that they knew that the transactions in question were irregular or unauthorised. This was decided in *Spackman v. Evans* (l).

By the deed of settlement, the members of a joint-stock company were allowed to retire on certain terms. The company got into difficulties and it was agreed at a meeting of the shareholders that on certain conditions dissenting members might withdraw. Spackman, one of the shareholders, entered into an agreement with the directors which allowed him to retire on conditions which were not those named in the deed of settlement nor those which were agreed to at the meeting referred to. No notice of the conditions arranged between Spackman and the directors was communicated to the shareholders, though the fact of his retirement was known to them. Twelve years afterwards a winding up order was made and Spackman's name was placed on the list of contributories. He objected, but the Court upheld the liquidator.

The plaintiff contended, among other things, that, assuming that the act of the directors in allowing him to retire on conditions other than those named in the deed or agreed to at the meeting already spoken of was *ultra vires* the directors, the subsequent conduct of the shareholders amounted to a ratification. Lord Cranworth said: "Looking to all which was thus done, I should certainly hold that the conduct of the continuing shareholders amounted to a ratification of the illegal or irregular acts of the directors, provided it be clear that the shareholders knew that they were illegal or irregular" (m). His lordship found that in the present instance no such knowledge could be imputed to the shareholders. They had the balance-sheets which showed cancellation of a large number of shares. But there was nothing to show that these cancellations were based on transactions, illegal or irregular.

For the purpose of proving acquiescence, then, it is necessary to prove knowledge (actual or constructive) of the irregularity or illegality in question. Mere lapse of time is not evidence of such acquiescence. As Lord Chelmsford observed in the case cited above: "It is necessary to consider the question of acquiescence apart from that of time..... But mere time alone would never, in my opinion, grow into acquiescence."

When a corporation has received notice (n) (actual or constructive) of

(l) L. R. 3 H. L. 171.

(m) L. R. 3 H. L. 171 at p. 194.

See *Re Florence Land and Public Works. Nicol's Case*, 29 Ch. D. 421 at pp. 435, 436, *Per* Chitty, J. "Well, the persons who did this, that is to say, placed the shares in Mr. Davies' name were the new directors, and they were acting as agents of the company, but after the lapse of nine years, when the company has gone on and held its meetings and carried on all business on the footing of Mr. Davies and his nominees being the shareholders, would not the company be deemed to have acquiesced in that which, on the hypothesis, was a mere excess of authority on the part of the directors." (The Italics are mine).

(n) On what constitutes notice, see further *Re Norwich Equitable Fire Assurance Society* 27 Ch. D. 515.
Boschoek Proprietary Co v. Fuke (1906) 1 Ch. 148.

an irregular or unauthorised transaction, it is its plain duty immediately to take steps to repudiate it. If it does not act promptly, but allows time to elapse, it will not be allowed to repudiate afterwards and will be bound by the irregularity. This point is well brought out in Lord Romilly's judgment in *Heyman v. European Central Railway Co.* (o).

In this case, a shareholder claimed to have his name removed from the list of shareholders on the ground that there had been suppression of material facts on the part of the directors. The court decided that there had been no such suppression; that even if there had been, the plaintiff had lost all his rights to relief by his delay. His Lordship observed: "There are three months at least and a portion of two more which he allowed to pass over without taking any step whatever.....It is obviously of the utmost importance in these cases that a shareholder should come at the earliest opportunity."

What acts may he
ratified.

The next question in connexion with ratification is,
what acts may be ratified?

It has been established beyond controversy that an act which is absolutely *ultra vires* the corporation cannot be ratified. The leading case is that of *Ashbury & Co. v. Riche* (p). It was argued in the Exchequer Chamber and the House of Lords. Both the courts affirmed the principle that a contract which is absolutely *ultra vires*, and therefore void at its inception, cannot be made valid by subsequent ratification. Blackburn, J., said: "I do not entertain any doubt that if, on the true construction of a statute creating a corporation, it appears to be the intention of the legislature, expressed or implied, that the corporation shall not enter into a particular contract, every court, whether of law or equity, every court is bound to treat a contract entered into contrary to the enactment as illegal and therefore wholly void, and to hold that a contract wholly void cannot be ratified" (q).

But an act which is not absolutely *ultra vires* the corporation but *ultra vires* merely in reference to the rights of its corporators, (that is to say, *ultra vires* in the secondary sense), may be ratified. We have seen that the corporation can do certain acts with the assent of all the corporators which would otherwise be *ultra vires*. But whatever the corporation may validate by their previous assent thereto, they can also validate by subsequent ratification. Hence acts which are *ultra vires* in the secondary sense may be ratified.

"It is upon this principle," says Mr. Brice, "though certainly it was not made the *ratio decidendi*—that *Phosphate of Lime Co. v. Green* may be supported. It was not absolutely outside the power of the company to cancel the shares there in dispute.....it was however not within its active powers then actually existing, and consequently it was *ultra vires* in the secondary sense—but having been acted upon and acquiesced in for a long time under circumstances which justified the inference that all the members were cognizant of, and not desirous to upset the proceeding, the presumption

(o) 7 Eq. 154 (169).

(p) 7 H. L. Cases 653.

(q) 7 H. L. Ca. 653.

necessarily followed that they had approved and affirmed that which they could, by taking the ordinary measure, have directed before-hand" (r).

In *Towers v. African Tug Company* (s), it was held that a shareholder in a limited company who with full notice or knowledge of the facts, himself received part of the proceeds of an *ultra vires* act committed by the directors—such as a payment of dividend out of capital—and who still retained the money, could not, either individually or as suing on behalf of the general body of shareholders, maintain an action against the directors—apparently among other grounds on the ground of acquiescence.

Further, as we have already seen, acts which are merely *ultra vires* the officials of a corporation, but *intra vires* the corporation may be ratified. We need not labour this point as a good many cases have already been cited in its support. But ratification of a past act *ultra vires* the officials does not extend to similar acts in the future. If the officials commit any illegality or irregularity, that may be cured by the corporators, if it is within their power to do so. But this ratification does not justify the officials in committing similar illegality or irregularity in the future. This was laid down in *Irvine v. The Union Bank of Australia* (t). There a company provided that the directors' power to borrow on the credit of the company should not exceed a certain amount, though the directors could extend their power by one-half of the votes of all the shareholders given at a general meeting. The directors borrowed sums from time to time on credit. They obtained, without any authority, a letter of credit for £10,000 which was subsequently ratified. This letter of credit expired on the 29th March, 1869, but it was renewed and a sum of £10,000 was borrowed on it. It was held that the ratification of the letter of credit for £10,000 by the shareholders did not authorize the renewal of it or the acting upon it, after the time originally limited had expired. "There is," said Sir Barnes Peacock, "a wide distinction between ratifying a particular act which has been done in excess of authority and conferring a general power to do similar acts in future" (u).

And lastly, acts which are irregular owing to the omission of a directory formality may be rendered valid by ratification. This follows from the very nature of directory formalities. But acts which are void *in incepto* owing to the omission of an imperative formality cannot, generally speaking, be ratified and made binding. They, as we have seen, form an essential part of the transaction and in their absence, the transaction is void *ab initio*. But even here, under certain circumstances, the courts will allow the principle of ratification to operate. For example, a transaction which is void owing

(r) Brice on *Ultra Vires* p. 634. It is worth noticing that in *Phosphate of Lime Co. v. Green* none of the learned judges seem to have considered whether the transaction was within the limits of the memorandum or consistent with the provisions of the Acts.

Trevor v. Whitworth 12 App. Cas. 409 at pp. 426-7.

(s) (1904) 1 Ch. p. 558.

(t) 2 A. C. 366.

(u) 2 A. C. 366.

to the omission of the seal may be acquiesced in and the parties may be held liable (v).

There remains one more question to be dealt with before we conclude this lecture viz., on whom is the *onus* of proof to show that the act or transaction complained of is *ultra vires*.

Burden of proof in question of *ultra vires*.

Corporations, as we shall see, have all such powers as are expressly or by implication given to them either by the legislature, or by Common Law, or by their own constating instruments. It is clear that in regard to acts and transactions which are apparently within their powers, express or implied, they will be presumed to be valid, unless those who impeach their validity are prepared to prove the contrary. But these are not the only powers which a corporation has. It is now established that in addition to its expressed and implied powers, a corporation has power to do all such acts as are incidental to, and may reasonably and properly be done under and along with, the main objects of its incorporation (w). The question is, in reference to these acts, on whom is the *onus* of proof to show that they are valid or invalid? The older authorities are inclined to take the view that the burden of proof is on the party who sets up their validity. Thus it is stated by the Court of Common Pleas in *East Anglian Railway Co. v. Eastern Counties Railway Co.*: "It is clear that the defendants have a limited authority only and are a corporation only for the purpose of making and maintaining the railway sanctioned by the Act and that the funds can only be applied for the purposes directed and provided for by statute" (x).

From this it would seem that the *onus* of proof in reference to such transactions as are incidental to and may reasonably and properly be done under the main objects of incorporation would be on the person who sets up their validity. But the more recent authorities are not prepared to accept this view, as would appear from what Lord Wensleydale says in *Scottish North-Eastern Railway Co. v. Stewart*. "There can be no doubt that a corporation is fully capable of binding itself by any contract under its common seal in England, and without it in Scotland, except when the statutes by which it is created or registered expressly or by necessary implication prohibit such contract between parties. *Prima facie*, all its contracts are valid, and it lies on those who impeach any contract to make out that it is avoided" (y).

This is perhaps going from one extreme to another. The doctrine of *onus* of proof must be reasonably applied by the court, having regard to the special facts and circumstances of the case before it. It may, however, be

(v) *Ecclesiastical Commissioners v. Merral*, L. R. 4 Ex. 163 *Walter's Case: re Vale of Neath* 3 De G. & Sm. 147; *Walton's Case: Re Royal British Bank* 26 L. J. (Ch.) 545. *Bargate v. Shortridge* 5 H. L. C. 297.

(w) *Attorney-General v. Great Eastern Ry. Co.* 5 App. Cas. 473 at p. 478. *Small v. Smith* 10 App. Cas. 119. *Shammugger Jute Factory Co. v. Ram Narayan Chatterji* I. L. R. 14 Cal. p. 189. at p. 196.

(x) 11 C. B. p. 775.

(y) 3 Macq. 382 at p. 415.

asserted that, generally speaking, the acts of a corporation are to be assumed to be valid and that it is for the party who challenges their validity to show the contrary. But in regard to acts which are clearly and manifestly beyond its powers no such presumption as to their validity will be made and the *onus* of proof would be on the party who sets it up.

Where a statute prescribes a procedure as a condition precedent to conferring jurisdiction or giving power to do an act, a non-compliance with the requirements of the statute makes the act a nullity.

When a certificate under Section 9 of the Public Demands Recovery Act (I of 1895) did not specify the amount and the space intended for the insertion of the figures was left blank and the certifying officer appeared to have mechanically signed it without perusal or consideration, it is not duly made under the provisions of the Act and a sale held under such a certificate is not valid. (z)

In *Baijnath v. Ramjat*. (a) Lord Davey observed:

"It is obvious that those are very stringent provisions. The proceeding in the first instance is apparently *ex parte*. The certificate is to be made by the Collector in a certain form and filed, and when the certificate is filed, it has the effect of a decree against the persons named as debtors in the certificate so far as regards the remedies for enforcing it, and when served, it also binds their immovable property. It is unnecessary to point out the necessity there is, when power is given to a public officer to sell the property of any of Her Majesty's subjects, that the forms required by the Act, which are matters of substance, should be complied with, and that if the certificate is to have the extraordinary effect of a decree against the persons named in it as debtors and to have the effect of binding their immoveable property, at least it should be in a form, such as provided by the Act, which enables any person who reads it to see who the judgment-creditor is, what is the sum for which the judgment is given, and that those particulars should be certified by the hand of the proper officer appointed by the Act for the purpose. If no such certificate is given, then the whole basis of the proceeding is gone. There is no judgment, there is nothing corresponding to a judgment or decree for payment of the amount, and there is no foundation for the sale. The authority to proceed to the sale is based on the certificate which has the effect of a judgment or decree, and if no judgment or decree is given, and no certificate is filed having the force or effect of a judgment or decree, there can be no valid sale at all" (b)

In order to deprive the proprietor of a permanently-settled estate of his right to take settlement of *Chur* land contiguous to his estate, it is necessary that the provisions of Regulation VII of 1822 should be strictly complied

(z) *Mohiuddin v. Pirthichand*, 31 I. C. 664.

(a) 23 Cal 775—23 I. A. 45 affirming 5 C. L. J. 687.

(b) See also *Mahomed Abdul Hai v. Gujraj Sahai*, 20 Cal. 826—20 I. A. 70, approving *Gujraj Sahai v. Secretary of State*, 17 Cal. 414; *Puranachandra v. Dinabandhu*, 34 Cal. 811.

with. In the absence of any report by the Settlement Officer or by the Collector that the settlement of *Chur* land with the proprietor of a permanently-settled estate contiguous to it, who was also the previous holder of the *Chur* would endanger the public tranquility or otherwise be seriously detrimental the Government have not the power to settle the *Chur* with a third party in contravention of Section 3 of Bengal Regulation VII of 1822 (c).

A District Magistrate has no jurisdiction to eject any person from property under section 43 of the Bombay District Police Act (IV of 1890) without first taking temporary possession himself and an order prohibiting a person from entering a temple under such circumstance is *ultra vires* (d).

Where a Sub-Deputy Magistrate not appointed by the Local Government to perform the functions of a Magistrate under the Assam Labour and Emigration Act (VI of 1901) acquitted certain persons of offences under section 164 of that Act, but at the same time passed an order that the proprietor of the garden for which the coolies were recruited should deposit the expenses of repatriation of the coolies, it was held that the "Sub-Deputy Magistrate's orders were entirely without jurisdiction inasmuch as section 2 of the Act defines the Magistrate as the Magistrate of the District, Sub-Divisional Magistrate or other persons appointed by the Local Government to perform the function of the Magistrate under this Act and this Sub-Deputy Magistrate was not so appointed by the Local Government. His orders are therefore clearly *ultra vires*." (e)

There is a distinction between a finding or conclusion and the reasons for the said finding or conclusion. As the Supreme Court said in *Mahabir Prasad v. State of Uttar Pradesh*, (f) it must appear not merely that the authority entrusted with quasi-judicial authority has reached a conclusion on the problem before him; it must appear that he reached a conclusion which is according to law and justice and for ensuring that end he must record the ultimate mental process leading from the dispute to its solution. Recording of reasons in support of a decision on a disputed claim by such an authority ensures that the decision is reached according to law and is not the result of caprice, whim or fancy or reached on grounds of policy or expediency. Reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject-matter for a decision whether it is purely administrative or quasi-judicial. As the Supreme Court said in another case, they should reveal a rational nexus between the facts considered and the conclusions reached. Only in this way can opinions or decisions recorded be shown to be manifestly just and reasonable (g). The reasons must be sufficiently clear and explicit in order to inspire confidence in the adjudicatory process.

(c) *Brindaban Chandra v. Karuna Nidhan*, 23 C. W. N. 261 = 50 I. C. 84. See also *Radhakant v. Secretary of State*, 23 C. W. N. 265 = 50 I. C. 94.

(d) *Dharmibhai v. Emp.*, 45 I. C. 396.

(e) *Emp. v. Ritu Chamar*, 22 I. C. 978. See also (*Emp. v. Dattatraya*, 14 I. C. 974.)

(f) A. I. R. 1970 S. C. 1302.

(g) *Union of India v. M. L. Kapoor*, A. I. R. 1974 S. C. 87.

The rule requiring reasons to be given in support of an order is, like the principle of *audi alteram partem*, a basical principle of natural justice which must inform every quasi-judicial process and this rule must be observed in its proper spirit and mere pretence of compliance with it would not satisfy the requirement of law (h). See also, the case laws referred to and discussed by the Supreme Court in Maneka Gandhi's Passport Case (i).

Where a person bonafide puts up constructions (in this case, temples, dharamsalas and shops) on land belonging to the State with the latter's permission he cannot be considered to be a trespasser. He cannot be removed by an executive fiat and it is well settled that the maxim, what is annexed to the soil goes with the soil, has not been accepted as an absolute rule of law in India(j). In this case, on the facts before it the Supreme Court condemned the action of the Government in taking the law into their hands and dispossessing persons concerned by the display of force as a callous disregard of the normal requirements of the rule of law apart from what might legitimately and reasonably be expected from a government functioning in a Society governed by a Constitution which guarantees to its citizens against arbitrary invasion by the executive of peaceful possession of property. While recording these observations the Supreme Court reiterated its earlier decision in *Wazir Chand v. State of Himachal Pradesh* (k) to the effect that the State or its executive officer cannot interfere with the rights of others unless they can point to some specific rule of law which authorises their acts. In *Wazir Chand's* case it was further held that seizure of goods in utter violation of the provisions of law amounted to an infringement of fundamental rights both under Art. 19 and Art. 31 of the Constitution of India (l).

The giving of a contract by a Deputy Commissioner in a manner which can counter to the policy of the legislature which is that matters of such consequence to the State revenue cannot be dealt with arbitrarily and in the secrecy of an office was held to be *ultra vires* (m). Where a statutory provision clearly prescribes certain requirements as condition precedent for the retrenchment of workmen, failure to comply with the said provisions renders the impugned orders invalid and inoperative (n). The determination of the question whether a provision is mandatory or directory would, in the ultimate analysis, depend upon the intent of the law maker. And that has to be gathered not only from the phraseology of the provision but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other. Following this principle Rule 5(2) framed by the Mysore Government and Rule 3(b)

(h) *Siemens Engineering v. Union of India*, A. I. R. 1976 S. C. 1785.

(i) A. I. R. 1978 S. C. 597

(j) *Bishan Das v. State of Punjab*, A. I. R. 1961 S. C. 1570.

(k) A. I. R. 1954 S. C. 415

(l) *Wazir Chand v. State of Himachal Pradesh*, A. I. R. 1954 S. C. 415.

(m) *Guruswamy v. State of Msore*, A. I. R. 1954 S. C. 592.

(n) *State of Bombay v. Hospital Mazdoor Sabha*, A. I. R. 1960 S. C. 610.

framed by the Madras Government under Sections 5A and 55 of the Land Acquisition Act, 1894 were held to be mandatory and not *ultra vires* of Section 5A and the Supreme Court quashed the notification under Section 6 made by the Collector for noncompliance with the requirements of the said Rule (o). Where it is a case of discretion of an authority, the Court would only quash the order and ask the authority to reconsider the matter if the discretion has not been properly exercised. But where the discretion is not absolute but is circumscribed by statutory provisions which lay down a duty on the Authority it is open to the Court to direct the Authority to carry out the duty so laid down in the Statute (p). Where the Central Government functioning as a quasi-judicial authority passes an order without giving opportunity to the party concerned to meet the case against it, the order is vitiated as being contrary to the principles of natural justice, the reason being that it was rendered without affording to the party a reasonable opportunity of being heard which is a *sine qua non* of a fair hearing (q). An error of law which is apparent on the face of the record can be corrected by a writ but not an error of fact, however grave it may appear to be (r) and where the order of a domestic tribunal makes a reference to several grounds, some relevant and existant, and others irrelevant and non-existent, the order will be sustained if the Court is satisfied that the authority would have passed the order on the basis of the relevant and existing grounds, and the exclusion of irrelevant or nonexisting grounds could not have affected the ultimate decision (s) but in any case reasons for decision must be stated (t).

In England the Town and Country Planning Act of 1971 forms the principal Act dealing at present with town and country planning. The requirements for planning permission are meant to regulate planning. In granting permission the local authority must consider the policies laid down in the structure plan. The permission is sometimes granted by the Minister, whose present designation is Secretary of State for Environment. The grant of permission being effective only for the purposes of the Act, the developer is not absolved of the necessity of complying with the provisions and requirements of other legislations and bye-law which relate to the use and development of land and construction of buildings and roads. Planning permissions may be accompanied by certain conditions but these conditions must be valid. The condition must fairly and reasonably relate to the permitted development. It must not be uncertain nor should it be "wholly unreason-

- (o) *State of Mysore v. V. K. Kangon*, A. I. R. 1975 S. C. 2190.
- (p) *Mahaboob Sheriff & Sons v. Mysore S. T. Authority*, A. I. R. 1960 S. C. 321.
- (q) *Brajlal Manilal and Co. v. Union of India*, A. I. R. 1964 S. C. 1643.
- (r) *Syed Yakoob v. K. S. Radhakrishnan*, A. I. R. 1964 S. C. 447.
- State of Maharastra v. B. R. Takkamore*, A. I. R. 1967 S. C. 1353.
- (s) *Swarn Singh v. State of Punjab*, A. I. R. 1976 S. C. 232.
- State of Orissa v. Bidyabhusan*, A. I. R. 1963 S. C. 779.
- (t) *Union of India v. M. L. Kapoor*, A. I. R. 1975 S. C. 87.
- Siemens v. Union of India*, A. I. R. 1976 S. C. 1785. *Supra*.

able”(u). The task of the Court is not to decide what it thinks is reasonable but to decide whether the condition imposed by the local authority is one which no reasonable authority acting within the corners of their jurisdiction could have decided to impose (v). Condition upon a developer to construct an ancillary road on its land for public use is invalid as the proper course is for the Council to acquire the land on proper compensation and then ‘construct the road at public expense’ (w). Condition in a permission to house-builder that the house when constructed should first be occupied for 10 years by persons on the Council’s waiting list is unreasonable (x). Such condition to a planning permission that the permission would terminate on the expiry of a certain period of time is equally invalid (y). A planning permission should not impose a condition taking away the existing right of user (z). On a proposal for reconstruction of a railway station the planning permission was granted with the condition imposed that a certain piece of land should, at all times, be made available for parking of cars and that the land should be used for no other purpose. An electric traction cable ran across this land and on the Council serving an enforcement notice upon the Board the latter preferred an appeal to the Minister who quashed the notice. The condition was held to be *ultra vires* as it “prevented the lawful use of land without compensation” (a).

Taxing laws are also not wholly immune from attack and may be struck down as *ultra vires*. Courts are not concerned with the policy underlying a taxing statute nor are they concerned as to whether a particular taxing statute could have been imposed in a different way or in a way that the Courts might think more just or equitable. If the legislature has classified persons or properties into different categories which are subjected to different rates of taxes with reference to income or property such a classification would not be open to attack of inequality on the ground that the tax burden resulting from such a classification was unequal. In deciding whether a taxation law is discriminatory or not it is necessary to bear in mind that the State has a wide discretion in selecting the persons or objects it will tax and a statute is not open to attack on the ground that it taxes some persons or objects and not others. It is only when within the range of selection, the law operates unequally and that cannot be justified on the basis of valid classification that it would be violative of Art 14 of our Constitution.

So the Supreme Court in India struck down as *ultra vires* the Travancor-Cochin Land Tax Act, 1955 as amended by the Act of 1957 which laid down

- (u) See *Pyx Granite Co. Ltd. v. Minister of Housing*, 1958 1-A.E.R. 625 & 1959-3 A. E. R. 503.
- (v) *Associated Provincial Picture House Ltd. v. Wednesbury Corporation*, 1947-2 A. E. R. 680.
- (w) *Hall & Co. Ltd. v. Shoreham on Sea*, U. D. C. 1964-1 A. E. R. 1.
- (x) *R. v. Hillingdon London Borough Council*, 1974-2 A. E. R. 643.
- (y) *Kingsway Investment v. Kent C. C.*, 1969-1 A. E. R. 601.
- (z) *Minister of Housing v. Hartnell*, 1965-1 A. E. R. 490.
- (a) *Kingston-upon-Thames Royal London B. C. v. Secretary of State for the Environment*, 1974-1 All. E. R. 193.

in barest outline the policy to impose a uniform rate of tax on all lands in the State of Kerala, without making any provision of issue of notice or submission of return and without any provision even for appeal. The Court held that inequality was writ large in the Act by reason of the fact, that a tax was levied at a flat rate irrespective of the quality of the land and consequently of its productive capacity (b). Similarly the Mysore High Court struck down the Mysore Building Tax Act, 1962 because it had adopted the floorage basis as the only basis for the imposition of the tax which was not only unscientific but was also arbitrary and mechanical. It did not conform to any of the known principles of taxation. In the very nature of things under that basis the incidence of tax must fall unevenly on things similar. The Court held that the object of the Act was not to limit the floorage of the buildings in towns but to raise public revenue and so the classification on the basis of floorage had no just relationship with the object of the Act (c). The Kerala Buildings Tax Act, 1961 was also struck down as *ultra vires* because it sought to impose tax on buildings on the basis of the floor-area of the building, without having anything to do with the quality of the building, its location, its usefulness and much less its value and for that matter the income that could be derived from that building. The value of a building located in a big city would be much higher than its counterpart elsewhere due to various reasons, namely, cost of construction, the cost of land on which it was built and its letting value will also be different from that of a similar building situated in the country. The Kerala High Court very correctly held that when taxes were levied on land and buildings the basis of the tax must either be the capital value of the land and the building or the annual letting value thereof (d). The Supreme Court approved the above decision and struck down the Bombay Municipal Corporation Act, 1949 as it sought to impose property tax on textile mills, factories, buildings of universities etc., adopting the flat rate method according to floor area (e). Following the above principles Sabyasachi Mukherji J. of the Calcutta High Court struck down as *ultra vires* the West Bengal Multi-storeyed Building Tax Act, 1975 (f). The State Legislature has, however, replaced the 1975 Act by a new Act in 1979, after the aforesaid decision. To sum up, therefore, taxation is exaction and even expropriation and, therefore, the right to property is in peril when a fiscal measure is afoot. Art 19 of the Constitution of India comes into play when law is made for purposes of taxation and that law must comply with the Part III i.e., the Fundamental Rights provided therein. Arbitrariness must be excluded in the law, for, if power is arbitrary it is potential inequality and Art 14 of the Constitution

(b) *K. T. Moopil Nair v. State of Kerala*, A. I. R. 1961 S. C. 451.

(c) *Bhubaneswar v. State*, A. I. R. 1965 Mysore 170.

(d) *N. Kunhali Haji v. State of Kerala*, A. I. R. 1966 Kerala 14.

(e) *N. M. C. S. & W. Mills v. Ahmedabad Municipality*, A. I. R. 1967 S. C. 1801.

(f) *State Bank of India v. State of West Bengal*, 1979-1 C. L. J 363.

is fatally allergic to inequality before the law. This was said by Iyer J of the Supreme Court as recently as in September, 1978 while dealing with a heavy bunch of writ petitions impeaching the validity of a tax on foreign liquor at the flat rate of one rupee per bottle imposed by the Punjab Government. The learned judge however, held that intoxicating liquids falling in the well known category of foreign liquors form one class and a flat minimal rate of rupee on per bottle has no constitutional stigma of inequality. Picking and choosing within limits is inevitable in taxation (g). Similarly, project-wise price fixation of flats cannot be dubbed as arbitrary or discriminatory in comparison with other projects at different places (h). But there cannot be taxation without legislation. Art 265 of the Constitution of India specifically provides "No tax shall be levied or collected except by authority of law." In other words, a tax including any impost, general, local or special, cannot be levied or collected by an executive fiat. There must be a law to support the same (i). Again, a taxing law, like other enactments, may be given retrospective effect, (j) but the validity of the tax has to be determined with reference to the competence of the Legislature concerned to enact the law when it was actually enacted (k). That excludes consideration of subsequent changes though an *ultra vires* tax law can be validated by a competent legislature by a re-validating Act (l).

We must, however, bear in mind that the Parliament or any State Legislature in India cannot impose tax to promote a particular religion or religious denomination. See.—Art 27 of the Constitution of India. That prohibition or restriction echoes the secular character of the State.

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- (g) *Avinder Singh v. State of Punjab*, A. I. R. 1979 S. C. 321; See also, *East India Tobacco Co's case* reported in A. I. R. 1962 S. C. 1733, where principles were correctly laid down.
 - (h) *Premji Bhai v. Delhi Development Authority*, A. I. R. 1980 S. C. 738.
 - (i) *Kerala v. Joseph*, A. I. R. 1958 S. C. 296.
 - (f) *Union of India v. Madangopal*, 1954 S. C. R. 841; *Muhammadbhai v. Gujarat*, A. I. R. 1962 S. C. 1517.
 - (k) *Amalgamated Coalfields v. Janapada Sabha*, A. I. R. 1961 S. C. 964.
 - (l) *Prithi Mills v. Broach Municipality*, A. I. R. 1970 S. C. 192; *Shindhe Bros v. Deputy Commissioner*, A. I. R. 1967 S. C. 1512.

THE GOVERNMENT OF INDIA

In this chapter and the following we shall discuss the powers of the Government of India and the local Government with special reference to the doctrine of *ultra vires*.

The powers of the Government of India in the first decade of the present century were of a two-fold character, executive and legislative. The former was exercised by the Governor-General in Council composed of (I) the Governor-General (II) the ordinary members and (III) the extra-ordinary members (if there be any). The latter was exercised by the same body enlarged for the purpose of legislation by the addition of nominated and elected members. The Governor-General in Council constituted as above for purposes of legislation will be referred to as the Indian Legislature.

Now as to the powers of the Indian Legislature.

The Indian Legislature as it then existed was established by the Indian Councils Act (24 & 25 Vict. c. 67.) in 1861. Section 22 of the Act enacts as follows—

The Governor-General in Council shall have power at meetings for the purpose of making laws and regulations as aforesaid, and subject to the provisions herein contained to make laws and regulation.....Provided always, that the Governor-General in Council shall not have power of making any laws or regulations which shall repeal or in any way affect any of the provisions of this Act:

Or any of the provisions of the Government of India Act, 1833, and of the Government of India Act, 1853 and of the Government of India Act, 1854, which after the passing of this Act shall remain in force:

Or any provisions of the Government of India Act, 1858 or of the Government of India Act, 1859;

Or of Act enabling the Secretary of State in Council to raise money in the United Kingdom for the Government of India:

Or of the Acts for punishing mutiny or desertion in Her Majesty's Army or in Her Majesty's Indian forces respectively, but subject to the provisions contained in Government of India Act, 1833, respecting the Indian Articles of War :

Or any provisions of any Act passed in the present session of Parliament, or hereafter to be passed, in any wise affecting Her Majesty's Indian territories, or the inhabitants thereof:

Or which may affect the authority of Parliament, or the constitution or rights of the East India Company (a), or any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland, whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom, or the sovereignty or dominion of the Crown over any part of the said territories".

It is clear from the section quoted above that the Indian Legislature like Colonial Legislatures was limited in its powers. It had not got the omnipotence of Parliament. In the first place, its powers were derived from statutes passed by Parliament and may be taken away by Parliament. In the second place, it had been invested with the power of making laws and regulations on certain specified subjects. And lastly, its general powers to legislate on those subjects had been restricted by certain prohibitions.

Before discussing some of the cases which arose in India we may, for our guidance, refer to some decisions of the Privy Council arising out of the British North America Act of 1867, a statute which was passed by the British Parliament shortly after the India Councils Act of 1861.

Where the authority to pass a law is challenged though for a limited relief and on a special cause it was held that this was sufficient to compel the Board to consider the question of *ultra vires* in its widest application. The Board would not bind themselves to consider only the one assigned reason and invalidity. The Privy Council further observed that according to the rules of pleading a mere allegation of infirmity in any statute on the ground of *ultra vires* was sufficient without assigning further reasons (b). Similarly, where it is found that the Government had no right to levy tax on property outside the Province, the laws and statutes which authorised the Government to raise such taxes were *ultra vires* and of no effect (c). Again when by a certain act a third party is to benefit and for that reason a part of the costs of construction of the new project is imposed upon him and advance is made for such construction with that object, the imposition would be *ultra vires* (d). In Canada laws are made for the peace, order and good government of the country as they are presumably so in all countries throughout the world where civil action prevails. Where federal structure has its existence in the framework of a country's constitution the question of jurisdiction or competency of the legislative bodies does arise. So in Canada, as the Privy Council held, unless laws are made for peace, order and good government of Canada the Dominion Parliament cannot make law trenching on subject-matters entrusted to provincial legislatures and therefore those laws are *ultra vires* (e).

Viscount Haldane accordingly held that the Board of Commerce

(a) The East India Company was not dissolved till 1874.

(b) *Burland v. King*, A. I. R. 1921 P. C. 163.

(c) *Cotton v. King*, 1916 Q. R. 25 K. B. 537.

(d) *British Columbia Electric Railway Co Ltd., v. Vancouver Corporation*, A. I. R. 1914 P. C. 217.

(e) *Attorney General, Canada v. Attorney General, Columbia*, A. I. R. 1916 P. C. 66.

Act, 1919 and the Combined and Fair Prices Act, 1919 were *ultra vires* of the Canadian Parliament, first because they were beyond the powers conferred by Sec.91 of the British North America Act, 1867 and secondly, because of the absence of such circumstances as war and famine which might have imperilled the peace, order and good government of the Dominion (f). Again, there is a distinction in the status of a corporate body created by a Charter and that created by a Statute. In the case of a Company created by Charter, the doctrine of *ultra vires* would have no very real application unless there were statutory restrictions added to what is written in the Charter. The reason is that such a company is invested with the capacity of a natural person to acquire powers and rights as well. That general capacity of a natural person is not, however, possessed by a company whose legal existence is wholly derived from the words of a Statute and therefore the doctrine of *ultra vires* applies to such companies (g). In a case from New Zealand the Privy Council held that the byelaws of the Government Railways Act, 1908 were *ultra vires* because of their ambiguity and also because they were offending against the rule-making power given under the said Act. Powers when conferred on the Railway for safety, convenience and due management of the railway traffic, cannot extend to oppressive interference of the rights of those who are subject to them (h). In a case from Ontario, it was held that an interference with a legal right or privilege, say of an institution, may not in all cases imply that such right or privilege has been prejudicially affected. But where a provision in a statute, in this case Sec 3 of the Act of 1915 (5 Geo. Vc 45) which enables it to be withdrawn in toto for an indefinite time does prejudicially affect. It is the creation of the power and not its exercise that is objectionable and the objection would not be removed even though the powers conferred were never exercised at all. To give authority to withdraw a right or privilege under these conditions necessarily affects and operates to the prejudice of a class of persons affected by withdrawal (i).

The powers of the legislature of India have been the subject of judicial controversy as well. The leading case is *R. V. Burah* (j). In that case Lord Selbourne discussing the constitution of the Indian Legislature observed as follows: "The Indian Legislature has powers expressly limited by the Act of Imperial Parliament which created it; and it can of course, do nothing beyond the limits which circumscribe those powers. But when, acting within these limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself. The established

(f) *In re: The Board of Commerce Act, 1919 and the Combines & Fair Prices Act, 1919*, A. I. R. 1921 P. C. 205.

(g) *Bonaza Creek Gold Mining Co. Ltd., v. Regem*, A. I. R. 1916 P. C. 193.

(h) *The King v. Catherine Lena Board*, A. I. R. 1915 P. C. 160.

(i) *Trustees of the R. C. S. Schools v. Ottawa Corporation & Ors*, A. I. R. 1916 P. C. 267.

(j) L. R. 3 App. Ca. 889. s. c. I. L. R. 4 Cal. 172.

Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question: and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created and by which negatively they were restricted".

From the words quoted above it is clear (1) that the Indian Legislature was limited in its powers: (2) that the Courts of Justice were entitled to enquire whether the Legislature had in any particular case acted beyond its powers and (3) that though the Indian Legislature derived its powers from Parliament, it was not an agent of the latter, but that it exercised powers as large, and of the same nature, as the latter. It was necessary for Lord Selbourne to decide the last point having regard to the fact that the High Court of Calcutta had held in the above case that the Indian Legislature being in the position of an agent of the British Parliament could not delegate its legislative functions to a third person.

Having plenary powers of legislation, the Indian legislature, could legislate either absolutely or conditionally; in the latter case leaving to the discretion of some external authority the time and manner of carrying its legislation into effect, as also the area over which it is to extend.

We have seen that the Courts of Law are competent to inquire into the question of the validity of the Acts of the Indian Legislature. Suppose it decides any such Act to be invalid, being beyond its powers. What is the position? The judges are entitled to refuse to give effect to the Act or any of the provisions of the Act as being *ultra vires*.

Having discussed the nature of the legislative powers of the Indian Legislature, let us now pass on to the restrictions that have been imposed on it. Section 22 of the Indian Councils Act 1861, as we have seen, had imposed several restrictions on the capacity of the Indian Legislature by a number of provisions one of which was as follows:

"The Governor-General in Council shall not have the power of making any laws or regulations which shall repeal or in any way affect any provisions of any Act passed in this present session of Parliament.....in any wise affecting Her Majesty's Indian territories or the inhabitants thereof."

Reliance has been placed on the above proviso of Sec 22 for the contention that the Indian Legislature cannot pass any Act affecting the High Courts on the ground that it would affect the provisions of the Indian High Courts Act of 1861, being an Act passed in the same session of the Parliament as the Indian Councils Acts, 1861. It has been held however that having regard to section 9 of the Indian High Courts Act of 1861, as also to certain clauses in the Letters Patent establishing the several High Courts, the Indian Legislature is competent to affect or alter their jurisdiction. In this connexion, Lord Selbourne observed as follows in the case already mentioned (*R. v. Burrah*): "The question, therefore, is, whether an exercise of the legislative power of the Governor-General in Council purporting to

exclude the jurisdiction of the High Court within the particular districts is inconsistent with any of the provisions of the Indian Councils Act, 1861? Now it appears to their Lordships from the express terms of the said Act, that (unless there should be anything to the contrary in the Letters Patent under which the High Court is established), the exercise of jurisdiction in any part of Her Majesty's Indian territories by the High Courts was meant to be subject to and not to be exclusive of, the general legislative power of the Governor-General in Council.....Lastly, by Letters Patent of the 28th December 1865 (cl 44), it is, "ordained and declared that all the provisions of these our Letters Patent are subject to the legislative powers of the Governor-General in Council, exercised at meetings for the purpose of making laws and regulations."

The question was again raised in *Thornton v. Thornton (k)*. In that case that petitioner, a European British subject resident at Secunderabad (Deccan), sued for a divorce alleging against the respondent various acts of adultery committed at Secunderabad.

The question arose whether sec. 2 of the Indian Divorce Act (IV of 1861) was *ultra vires* and, as such, incompetent to confer jurisdiction on the Bombay High Court to try the suit under the provisions of that Act.

Sec. 2 is as follows:

"This Act shall extend to the whole of British India and (as far only as regards British subjects within the dominions hereinafter mentioned) to the dominions of Princes and States in alliance with Her Majesty."

It was contended in this case that inasmuch as the Governor-General in Council is authorised under sec. 3 of the Indian High Courts Act (28 & 29 Vict. c. 15) to confer jurisdiction on High Courts, in regard to British subjects resident within the dominions of Native States by an executive act, he was not competent to do so by legislation and that therefore sec. 2 of the Indian Divorce Act was *ultra vires*. Scott, J., in deciding against this contention held that the Indian Legislature was competent to alter the jurisdiction of the High Courts and that this general power was not taken away by the fact that a special power of altering the limits of jurisdiction by an executive order had been conferred by the Indian High Courts Act, 1865.

We now pass on to another restriction *viz*, "The Governor-General in Council shall not have the power of making any laws or regulations which shall repeal or in any way affect any of the provisions of the Government of India Act, 1858." Section 65 of the latter Act lays down that the Secretary of State in Council shall and may sue and be sued as well in India as in England and that all persons and bodies politic shall and may have and take the same suits, remedies, and proceedings, legal and equitable, against the Secretary of State for India as they could have done against the Company.

The question arose in the case of *Secretary of State for India v. Moment*

(k) I. L. R. 10 Bom. 422. See also *R. v. Meares*, 14 B. L. R. 106. In the matter of the petition of Feda Hossein, I. L. R. 1 Cal. 431.

(f), whether Sec. 41 Cl. (b), of the Lower Burma Towns & Villages Act (Burma Act No. IV of 1898) was *ultra vires* and inoperative, having regard to the restriction mentioned.

It was contended on behalf of the Secretary of State before their Lordships in the Privy Council that Sec. 65 of the Government of India Act, 1858, was not intended to place a fetter on Indian Legislatures and that they were competent to vary the rights which private individuals had against the East India Company. But it was held by their Lordships "that the effect of Sec. 65 of the Act, 1858, was to debar the Government of India from passing any Act which could prevent a subject from suing the Secretary of State for India in Council in a civil court in any case in which he could have similarly sued the East India Company"; and that the Governor-General in Council not having the power under the proviso to Sec. 22 of the Indian Councils Act of 1861 to repeal or in any way affect amongst other matters, any provisions of the Government of India Act 1858, Sec. 41(b) of Act IV of 1898 (Burma) which debars a civil court from entertaining any claim against the Government to any right over land was *ultra vires*, and of no effect.

There is one more rather important restriction which we shall notice before we leave this part of the subject and which is in the following proviso to Sec. 22.

"The Governor-General in Council shall not have the power of making any laws or regulations which may affect the authority of Parliament, or the constitution and right of the East India Company, or any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland, whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom, or the sovereignty or dominion of the Crown over any part of the said territories". This proviso has been the subject of judicial consideration in the well-known case of Amir Khan (6 B. L. R. 392). In that case, Amir Khan was arrested and imprisoned under Regulation III of 1818. Amir Khan applied for a writ of *Habeas Corpus*, on, among other grounds, viz., that Regulation III of 1818 which takes away the liberty of the subject and deprives him of the elementary right of being heard in a Court of Law is *ultra vires*, inasmuch as it affects part of the unwritten law and the constitution whereon allegiance of the subject depends. It was argued that the allegiance of a subject could be demanded only on the ground that the Crown afforded protection and that therefore any Act of the Legislature which deprived the subject of protection affected the allegiance of the subject to the Crown. Markby J. in overruling this contention observed as follows: "The allegiance of a British subject in no way whatever depends on the existence or non-existence of such a power as conferred by the Regulation of 1818. I wholly repudiate the doctrine

(f) 17 C. W. N. p. 169. Sec. 41 Cl. (b) is as follows:

"No civil courts shall have jurisdiction to determine any claim to any right over land as against Government."

contended for that the allegiance can by any possibility be legally affected by the mere withdrawal from the subject of any right, privilege or immunity whatever.

“Besides the formal power of making laws through the Legislative Council, the Governor-General in Council under an Act of 1870 has power to legislate in a more summary manner by means of regulations for the government of certain districts of India of a more backward character..... Under a section of the Act of 1861 the Governor-General has also power, in cases of emergency to make temporary ordinances which are to be in force for a term not exceeding six months”(m).

In consequence of the recommendations of Lord Morley, Secretary of State, the Indian Councils Act, 1909 (9 Edw. VII. c. 35) made important changes in the constitution and functions of the Indian Legislative Councils and gave power to make changes in the executive Governments of the Indian Provinces. The Government of India Act, 1915 (5 & 6 Geo. V. c. 61) consolidated all the statutory provisions relating to the Indian constitution and this was amended by the Amending Act (6 & 7 Geo. V. c. 37).

As a result of the Montagu-Chelmsford Report, 1918, the Government of India Act, 1919, (9 & 10 Geo. V. c. 101) was passed which introduced a considerable measure of reform and laid the foundation for responsible Government in India. The following are the important provisions laying down the powers of the Imperial and Local Legislature:

S. 80A. (1) The local legislature of any province has power subject to the provisions of this Act, to make laws for the peace and good government of the territories for the time being constituting that province.

(2) The local legislature of any province may, subject to the provisions of the sub-section next following repeal or alter as to that province any law made either before or after the commencement of this Act by any authority in British India other than that local legislature.

(3) The local legislature of any province may not, without the previous sanction of the Governor-General, make or take into consideration any law—

(a) imposing or authorizing the imposition of any new tax unless the tax is a tax scheduled as exempted from this provision by rules made under the principal Act; or

(b) affecting the public debt of India, or the customs duties, or any other tax or duty for the time being in force and imposed by the authority of the Governor-General in Council for the general purposes of the Government of India, provided that the imposition or alteration of a tax scheduled as aforesaid shall not be deemed to affect any such tax or duty; or

(c) affecting the discipline or maintenance of any part of His Majesty's naval, military, or air forces; or

(m) *The Government of India* by Ilbert p. 145, 3rd edition. This point was taken in a later case, *Alter Kaufmann v. The Government of Bombay* I. L. R. 18 Bom 636, and over-ruled. See the Government of India Act 1870 and the Indian Council Act. 1861, Sec 23.

- (d) affecting the relations of the government with foreign princes or states; or
- (e) regulating any central subject; or
- (f) regulating any provincial subject which has been declared by rules under the principal Act to be, either in whole or in part, subject to legislation by the Indian legislature, in respect of any matter to which such declaration applies; or
- (g) affecting any power expressly reserved to the Governor-General in Council by any law for the time being in force ; or
- (h) altering or repealing the provisions of any law which, having been made before the commencement of this Act, by any authority in British India other than that local legislature, is declared by rules under the principal Act to be a law which cannot be repealed or altered by the local legislature without previous sanction; or
- (i) altering or repealing any provision of an Act of the Indian legislature made after the commencement of this Act, which by the provisions of that Act may not be repealed or altered by the local legislature without previous sanction.

Provided that an Act or a provision of an Act made by a local legislature, and subsequently assented to by the Governor-General in pursuance of this Act, shall not be deemed invalid by reason only of its requiring the previous sanction of the Governor-General under this Act.

(4) The local legislature of any province has no power to make any law affecting any Act of Parliament.

Where a person has a right of action against the East India Company that right of action cannot be taken away by any Act passed by the Indian legislature, after the possession of the Company had been vested in the Crown (n).

Under Section 65 of the Government of India Act, 1858 all persons and public bodies shall and may have and take the same suits, remedies and proceedings, legal and equitable, against the Secretary of State in Council as they could have done against the said Company. The Legislative Council of the Governor-General derives its legislative powers from section 22, Indian Councils Act, 1861 which contains a proviso that the Governor-General in Council shall not have the power of making any laws or regulations which shall affect any provision of the Government of India Act, 1858. The Chief Court held that Section 51(b) Lower Burma Town and Village Lands Act, did affect the provision of section 65 of the Government of India Act, 1858 inasmuch as it purported to take away the right which was possessed by every one prior to 1858 of bringing suits for land against the East India Company (o). This judgment was upheld by the Privy Council (p).

(n) *Damodar Tukaram v. Secretary of State*, 45 Bom. 1161.

(o) *J. Moment v. Secretary of State*, 5 L. B. R. 163, 8 I. C. 1129.

(p) *Secretary of State v. J. Moment*, 40 Cal. 391, 40 I. A. 48.

Similarly under section 53(2), Upper Burma Land and Revenue Regulation, a Civil Court shall not exercise, jurisdiction over any claim to the ownership or possession of any State land or to establish any lien upon or in other interests in such land (q). The Judicial Commissioner held that this section was *ultra vires* of the Legislature and said :—

“Now the concluding part of section 22 of the Indian Councils Act, 1861 lays down that the Governor-General in Council shall not have the power to make any law or regulation which shall in any way, affect any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland, whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom. I take it that what this means is, no laws shall be made contravening the fundamental principles on which British *civilization* is based, e.g., freedom of the person, freedom of religion, equality before the law, etc.

“Now section 53, Upper Burma Land and Revenue Regulation, seems to be clearly an attempt to introduce in a mild way into Burma what is known in France as the “*droit administratif*,” which is fundamentally opposed to English ideas.

“I think it is clear that section 53(2) (ii), Upper Burma Land and Revenue Regulation, does affect one of the unwritten laws referred to in section 22, Indian Councils Act, and is, therefore, *ultra vires*. It may well be that in a backward country, the advantages of the “*droit administratif*” may far outweigh its disadvantages and that it may, therefore, be worth while to introduce such a scheme and the introduction could hardly be taken as a hardship to persons who lived under the old Burmese regime, and in the course of time as the people became more enlightened the operation of the scheme might be gradually restricted as is happening at present in France, but I think it is clear that such a scheme could be introduced by the British Parliament alone.

“I accordingly hold that section 53(2) (ii), Upper Burma Land and Revenue Regulation, is *ultra vires* of the Legislature and that the present suit was cognizable by the Civil Courts and I direct that the appeal be now heard on the merits.”

Section 82 of the Government of India Act, 1919, had provided for the power of Crown to disallow Acts of local legislatures and read thus:

- (1) When an Act has been assented to by the Governor-General, he shall send to the Secretary of State an authentic copy thereof, and it shall be lawful for His Majesty in Council to signify his disallowance of the Act.
- (2) Where the disallowance of an Act has been so signified, the governor, lieutenant-governor or chief commissioner shall forthwith notify the disallowance, and thereupon the Act, as from the date of the notification, shall become void accordingly.

And for the validity of Indian Laws,

(q) *Mahomed Amin v. Nachiappa Chetty* [8 Bur. L. T. 45=29 I. C. 736.]

Section 84 provided for the removal of doubts as to validity of certain Indian Laws as follows:—

- (1) A law made by any authority in British India shall not be deemed invalid solely on account of any one or more of the following reasons :
 - (a) in the case of an Act of the Indian legislature or a local legislature, because it affects the prerogative of the Crown; or
 - (b) in the case of any law, because the requisite proportion of non-official members was not complete at the date of its introduction into the council or its enactment; or
 - (c) in the case of an Act of a local legislature, because it confers on magistrates, being justices of the peace, the same jurisdiction over European British subjects as that legislature, by Acts duly made, could lawfully confer on magistrates in the exercise of authority over other British subjects in the like cases.

A law made by any authority in British India and repugnant to any provision of this or any other Act of Parliament shall, to the extent of that repugnancy, but not otherwise, be void.

(2) Nothing in the Government of India Act, 1919 or this Act, or in any rule made thereunder, shall be construed as diminishing in any respect the powers of the Indian legislature as laid down in section sixty-five of this Act, and the validity of any Act, of the Indian legislature or any local legislature shall not be open to question in any legal proceedings on the ground that the Act affects a provincial subject, or a central subject, as the case may be, and the validity of any Act made by the governor of a province shall not be so open to question on the ground that it does not relate to a reserve subject.

An interesting question had been raised in the courts of this country viz. whether the Indian Legislature was competent to legislate for offences committed on the high seas. In *R. v. Aloo Paroo* (r), Sir H. Roper observed that “when the legislature of Great Britain proposed to itself to delegate legislative powers with regard to India and the courts therein to the legislative council of India, it is reasonable to suppose that it was intended to relegate to such legislative council power to prescribe the law to be administered as well as respect to offences committed on the high seas and prosecuted in India as with respect to offences committed on the Indian soil.” This view was questioned in a Bombay case (s), if not definitely overruled. The point again came up for consideration in *R. v. Kastya Rama* (t). West, J., inclined to the view that the Governor-General in Council has no power to legislate for offences committed on the high seas beyond the territorial limits.

(r) Perry's Or. Ca. 551.

(s) *R. v. Elmstone* 7 Bom. H. C. R. (Crown Cases) p. 89.

(t) 8 Bom. H. C. R. (Crown Cases) p. 63.



There is no doubt that the Indian Legislature is competent to legislate with reference to the territorial waters. It can also legislate with reference to British Indians on the high seas beyond the territorial waters (u). The question is, has it got a power to legislate generally with reference to the high seas? Having regard to the fact that the Indian Legislature was a non-sovereign body and to the theory of international law that territorial sovereignty does not extend beyond the territorial limits, it may be laid down that the authority of the Indian Legislature did not extend beyond the territorial waters. It should be noticed however that by the Indian Marine Service Act 1884, sec. 2 (47 & 48 Vict. c. 38) the Indian Legislature had been specially empowered to make laws for all persons employed or serving in, or belonging to the Indian Marine Service, provided that a law made under the section would not apply to any offence, unless the vessel to which the offender belonged was at the time of the commission of the offence within the limits of the Indian waters as defined by the Act.

Sec. 3 of the Act defined the expression "Indian waters" so as to include the high seas between the Cape of Good Hope on the west and the straits of Magellan on the east and all territorial waters between these limits. Then under this Act the Indian Legislature is specially authorized to legislate for offence committed on certain parts of the high seas by persons employed in the Indian Marine Service.

Sections 2, 3, 4, and 5 of the Indian Marine Service Act were later repealed by the Government of India Act 1919 as it repealed many other Imperial Statutes passed by the British Parliament during the period of nearly one and a half century beginning from the East India Company Act 1770 to the Government of India Act, 1912. Relevant to our present topic we may refer to Sec. 66 of the Act of 1919 relating to the laws for the Royal Indian Marine Service. Sec. 66(1) which is relevant reads:—

A law made under this Act for the Royal Indian Marine Service shall not apply to any offence unless the vessel to which the offender belongs is, at the time of commission of the offence, within the limits of Indian waters, that is to say, the high seas between the Cape of Good Hope on the West and the straits of Magellan on the East and any territorial waters between those limits.

Still later, with the commencement of the Government of India Act, 1935, the whole of the Act of 1919 (except its pre-amble) was repealed as mentioned in Sec. 321 and the tenth Schedule appended to the 1935 Act which provided three legislative lists, the federal and the other provincial, the third list being the concurrent list for the Federal and Provincial Authorities. The Power to make legislations on Maritime Shipping and Navigation, including Shipping and Navigation on territorial waters and the Admiralty jurisdiction was given to the federal Legislature, so also laws for offences with respect to any of those matters. (List I. Entries 21 and 42).

(u) See Sec. 22 of 24 and 25 Vict. C. 67.

Again Section 65 of the 1919 Act while specifying the powers of the Indian Legislature to make laws put wide limitations on those powers and laid down that the Indian Legislature had not the power to make any law affecting the authority of Parliament or any part of the unwritten laws or Constitution of the United Kingdom of Great Britain and Ireland whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom or affecting the sovereignty or domination of the Crown over any part of British India. Sec, 65 also provided that the Indian Legislature had not the power without the previous approval of the Secretary of State in Council to make any law empowering any Court other than a High Court, to sentence to punishment of death any of His Majesty's subjects born in Europe or the children of such subjects or abolishing any High Court, as already mentioned. Commenting upon those statutory provisions Dicey had said; The Legislative powers of the Governor General in Council (Indian Legislature) arise from definite Parliamentary enactments. These Acts constitute what may be termed as regards the legislative Council, the Constitution of India. Now observe, that under these Acts, the Indian Council is in the strictest sense a non-sovereign legislative body, and this independently of the fact that the laws or regulations made by the Governor General in Council can be annulled or disallowed by the Crown, (Dicey on the Law of the Constitution, 10th Ed, Page 99). All these are past history and any elaborate discussion on the topic cannot be the subject matter of these lectures. The Act of 1919 as well as the Act of 1935 have been repealed in course of time as the country journeyed to its goal of independence.

We now turn to the powers of the Government of India in their executive capacity. A detailed examination of these powers would be outside the scope of this work. We shall confine ourselves to the consideration of the extraordinary powers that have been conferred on the Government by legislation. It is one of the principles of English law that nobody's property or liberty should be in jeopardy except under the sentence of a competent court of law. This was also the guiding principle of British administration in this country. But certain exceptional powers had been conferred on the Indian executive which authorised it summarily to arrest and imprison individuals, as also to confiscate their property without giving them any opportunity to be heard in a court of law. Bengal Regulation III of 1818 enabled the Governor-General in Council to arrest and imprison any person under a warrant issued under the Regulation. A person so arrested and imprisoned had no remedy in a court of law, a warrant of commitment being a sufficient authority for the detention of the person in any fortress, jail etc. Even if the warrant was issued after the arrest, that would not justify a court of law in questioning the legality of the detention under the Regulation (v).

It was contended in the case of *Amir Khan* already cited the Regulation III of 1818 contemplated alien political prisoners and did not extend to natural-born subjects of Her Majesty. This contention was overruled by

(v) *In the matter of Amir Khan* 6 B. L. R. 392.

Markby, J., who observed as follows:—"I think the power of arrest and imprisonment is given quite generally and the Governor-General in Council is made the sole judge of the necessity of using it."

A similar power has been conferred on Government with reference to the arrest and detention of foreigners in this country. Act III of 1864 gave power to the Government of India as also to the Local Governments to order any foreigner to remove himself from British India, and in default to arrest and imprison him, upon such terms and conditions as the Government may deem sufficient for the peace and security of British India and of the allies of His Majesty and of the neighbouring Princes and States.

In the case of *Alter Kaufman v. Gouvernement of Bombay* (w), where the Government under the above Act, had ordered Kaufman and two others, all foreigners, to remove themselves from British India and had them, on their default, arrested and imprisoned, it was argued on behalf of the prisoners that the imprisonment was illegal, inasmuch as Act III of 1864 was intended to be applied to assure peace and security, and that the arrest of the prisoners, being not for that purpose, was illegal. Sterling, J., in overruling this contention observed that the Act gave the fullest power to the Government to order any foreigner to remove himself from India, that the Government was the sole judge of what was necessary for the peace and security of British India and that if it acted according to the letter of the Act, the courts could not enquire into the sufficiency of its reasons for so acting.

In exercising such extraordinary powers mentioned above, the executive should act in accordance with the provisions of the Act which gives them the power. First, it should not go beyond the Act; and secondly, if any procedure has been laid down for the exercise of the powers given by the Act, it should scrupulously comply with the same. Failure to observe either of these principles will justify a court of law to set aside anything done under the Act as being *ultra vires* and illegal. The first principle is illustrated by the case last cited and the second by another case viz:—*In the matter of Rudolph Stallmann* (x).

In the former case, the arrest and imprisonment of Kaufman and two others were declared illegal by reason of the direction contained in the warrant that the persons named therein should remove themselves by *sea* to the places mentioned therein, it being held that such direction was *ultra vires* and illegal. Bailey, J., was of opinion that the Government of India could not legislate with reference to the high seas and that therefore the Government of Bombay had exceeded its power given under the Act in directing the prisoners to remove themselves by sea to places outside British India.

In the case of Stallmann, a German foreigner, who was arrested for extradition under a warrant of the Government of India issued under the Indian Extradition Act (XV of 1903) it was held that the Government can

(w) I. L. R. 18 Bom. 636.

(x) 15 C. W. N. 1053.

only issue a warrant by virtue of the provisions of the legislature authorising it, and that if those provisions have not been carried out, the warrant and the custody thereunder may be pronounced illegal under Sec. 491 of the Criminal Procedure Code, though with the extradition proceedings themselves, the High Court, except as allowed by the Act, cannot directly interfere.

Sec. 491 (since repealed) read as follows:

1. Any High Court may, whenever it thinks fit, direct—
 - (a) that a person within the limits of its appellate Criminal jurisdiction be brought up before the Court to be dealt with according to law;
 - (b) that a person illegally or improperly detained in public or private custody within such limits be set at liberty;
 - (c) that a prisoner detained in any jail situate within such limits be brought before the Court to be there examined as a witness in any matter pending or to be inquired into in such Court;
 - (d) that a prisoner detained as aforesaid be brought before a Court-martial or any Commissioners*** for trial or to be examined touching any matter pending before such Court-martial or Commissioners respectively;
 - (e) that a prisoner within such limits be removed from one custody to another for the purpose of trial; and
 - (f) that the body of a defendant within such limits be brought in on the Sheriff's return of *cepi Corpus* to a writ of attachment.
2. The High Court may, from time to time, frame rules to regulate the procedure in cases under this section.

Under Sec. 3 of the Extradition Act the Magistrate who holds the enquiry should take evidence for, as also against, a foreign criminal. In this case, Stallmann asked for an adjournment of the inquiry with a view to procuring evidence in his behalf. The Magistrate refused to adjourn and to give him a reasonable opportunity of adducing evidence. It was accordingly held that proper opportunity for defence as provided by the Act had not been given by the Magistrate and that the inquiry was not therefore according to law, and the extradition warrant issued on such proceeding was invalid and did not justify detention under it. The warrant was accordingly set aside and the petitioner set at liberty.

Extradition matters are now governed in India by the Extradition Act, 1962 and brought into force on 5th January, 1963 by notification in the Gazette of India. Until then the law of extradition applicable to India was found to be scattered in the United Kingdom Extradition Acts, 1870 to 1932, the Fugitive Offenders Act, 1881 and the Indian Extradition Act, 1903. The U. K. Extradition Act of 1870 in its application to India authorised the extradition of fugitive offenders between India and foreign States. The Act of 1881 provided a method whereby the extradition of fugitive offenders could be effected between British dominions and other

possessions. The Act of 1903 modified and supplemented those other laws. The case referred to above was decided under the Extradition Act of 1903. In the case of *State of Madras v. C. G. Menon* (y), the Supreme Court held that after India became a Republic, the Fugitive Offenders Act, 1881, has ceased to apply to India. Besides, there were many lacunae in the law relating to extradition then prevailing in India. In order to remove all these anomalies and to fill in the lacunae the Parliament, in 1962, passed the Extradition Act, 1962. Under this Act an extradition offence means (i) in relation to a foreign State, being a treaty State, an offence provided for in the extradition treaty with that State and (ii) in relation to a Commonwealth country an offence which is specified in, or which may be specified by notification under, the Second Schedule appended to the Statute. Treaty includes those made before or after 15th August 1947 and a foreign State means any State outside India other than a Commonwealth Country. The Act has been divided into 5 chapters and they relate to extradition of fugitive criminals to foreign States, return of fugitive criminals to Commonwealth countries, surrender or return of accused or convicted persons from foreign States or Commonwealth countries and liabilities of fugitive criminals to be arrested and surrendered or returned. It also provides the Central Government with power to discharge any fugitive criminal. When the Central Government directs the District Magistrate to hold inquiry under Sec. 5 of the 1962 Act the District Magistrate cannot delegate the inquiry to some other magistrate(z). The Statute of 1962 cannot be said to be exhaustive on the subject of extradition. Relevant to this topic are Section 4 and 216 of the Indian Penal Code which show the extent to which the Code applies to offences committed outside India. One has also to refer to the Foreigners Act passed by the Indian Parliament. Dicey in his Introduction to the Study of Constitutional Law had pointed out: Suppose, for example that a body of foreign anarchists come to England and are thought by the police on strong grounds of suspicion to be engaged in a plot, say for blowing up the Houses of Parliament. Suppose also that the existence of the conspiracy does not admit of absolute proof. An English Minister, if he is not prepared to put the conspirators on their trial, has no means of arresting them, or of expelling them from the country. In case of arrest or detention they would be set at liberty by the High Court. The British Parliament realised the lacuna and passed the Aliens Restriction Acts, 1914 and 1919 followed by the Aliens Order, 1953 under which the Home Secretary now has power to order the deportation of any undesirable alien, if he considers that such action is in the public interest. In India, Section 7 of the Influx from Pakistan (Control) Act, 1949 authorised the Central Government to remove from India any person who has committed or against whom a reasonable suspicion exists that he has committed an offence under the Act. The penalty of removal is thus imposed not only when an offence is committed but also when

(y) A. I. R. 1954 S. C. 517.

(z) I. L. R. (1969) 2 Cal 208.

a reasonable suspicion is entertained by the Central Government, a matter entirely of its subjective determination. There was no opportunity to the offender to clear his conduct. The Supreme Court accordingly struck down Sec. 7 as void (a).

Entry 17, of the Federal Legislative list of the Government of India Act, 1935 had authorised, the Central Government to make laws relating to admission into, and emigration and expulsion from India, including in relation thereto, the regulation of the movements in India of persons who are not British subjects domiciled in India, subjects of any Federal State or British subjects domiciled in the United Kingdom. Since after independence and the commencement of the Constitution of India the picture has completely, and quite naturally, changed. Arts 5 to 11 of the Constitution speak as to who are the citizens of India as on January 26, 1950 which is the date of the commencement of the Constitution and the Citizens have been classified into 3 categories, namely (a) citizens by domicile, (b) citizens by migration and (c) citizens by registration. Domicile implies permanent home and so mere domicile and residence will not make a person a citizen of India. He must have both domicile and at least 5 year's residence to make him an Indian citizen. Art 6 which speaks of migration supplements Art 5 in the conception of the idea of citizenship. But Art. 7 over-rides Arts 5 and 6 and says any person who has after 1-3-1947 migrated from India to the territory now known as Pakistan shall not be deemed to be a citizen of India, (b). Art 8 relates to the rights of citizenship of certain persons of Indian origin residing outside India. Art 9 lays down that no person can be a citizen of India under any of the Arts, 5, 6, or 8 if he has voluntarily acquired the citizenship of a foreign country. Whether a person has acquired the citizenship of a foreign country is to be determined by the Central Government (c). Art. 11 empowers the Parliament to make laws with respect to the acquisition and termination of citizenship and all matters relating to citizenship. Accordingly, by virtue of this provision in the Constitution the Parliament has passed the Citizenship Act 1955 which provides for acquisition of citizenship by birth (as on or after January 26, 1950).

It should be noticed, however, that the jurisdiction of the Courts of Law in this country to examine the legality of the acts of the executive may be taken away by law, and if this has been done in any case, the Courts are absolutely powerless to interfere, even if it be found that the act in question is not in conformity with the provisions of law. This has been made clear in the case of *Mohamed Ali*. In that case the Government of Bengal acting under the Indian Press Act (I of 1910) seized a copy of a pamphlet belonging to Mahomed Ali and entitled "Come over into Macedonia and help us," the said pamphlet having been previously declared to be

(a) *Ebrahim v. State of Bombay*, 1954 S. C. R. 933.

(b) *Madhya Pradesh v. Peer Mohd*, A. I. R. 1963 S. C. 645; *State of Bihar v. Amar Singh*, A. I. R. 1955 S. C. 282.

(c) *State of Andra Pradesh v. Khadar*, A. I. R. 1961 S. C. 1467.

forfeited to His Majesty by a notification issued by the Government of Bengal under the Indian Press Act. It was contended, *inter alia*, on behalf of the petitioner that the forfeiture and the seizure were bad in law, inasmuch as the notification declaring the forfeiture did not comply with the provisions of the Act. His Lordship the Chief Justice in overruling this contention observed as follows: "The notification therefore appears to me be defective in a material particular, and, but for Section 22 of the Act, it would (in my opinion) be our duty to hold that there had been no legal forfeiture."

"That section, however, provides that every declaration purporting to be made under the Act shall, as against all persons, be conclusive evidence that the forfeiture therein referred to has taken place. The result is, that though I hold the notification does not comply with the provisions of the Act, still we are (in my opinion) barred from questioning the legality of the forfeiture it purports to declare (d).

The struggle for freedom of the Press is as old in our country as the struggle for freedom itself and from 1857 to the Indian Press Act of 1910

Freedom of the Press.

to the Constitution of India is a long way march. In our Penal Code of 1860, we still have Sec 124A which makes sedition a crime against the State and therefore against the society and sedition would embrace all sorts of expressions by words, deed, writings, signs or other visible representations which bring or attempt to bring into hatred, contempt or disaffection towards the Government established by law in India. But comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means without exciting or attempting to excite hatred, contempt or disaffection would not constitute sedition. Introduced into the Code in 1927 is Sec 295A which makes any deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs punishable as an offence. In order to give effect to the International Convention for the Suppression of the Circulation of, and Traffic in, Obscene Publications signed at Geneva on September 12, 1923, Secs. 292 and 293 were inserted in the Penal Code by the Obscene Publications Act of 1925. Section 228 is another provision in the Code which makes it an offence if one intentionally offers an insult or causes any interruption to any public servant, while such public servant is sitting in any stage of a judicial proceeding. What, however, is unfortunate in cases coming under this section is that the Court is both the prosecutor and judge of the offence of contempt of the Court. Courts of record have inherent power to punish contempts of their authority whether committed in the face of the Court or vicariously upon the persons of their officers. Art 129 of the Constitution of India says that the Supreme Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself and it is a summary power as the Court itself held in *Hiralal v. State of U.P.* (e). With all these limitations to one's "right to

(d) 18 C. W. N. 1 at 14.

(e) A. I. R. 1954 S. C. 743. See also, *Roy v. State of Orissa*, A. I. R. 1960 S. C. 190.

swing his arms" Art 19(1)(a) of our Constitution says that all citizens of India *shall* have the right to freedom of speech and expression. The word expression, the Supreme Court says in *Ramesh Thapar's* case (f) would include the idea of publication and in a later case, *Hamdard Dawakhana v. Union of India* (g), that it would also include the right to acquire and import ideas and information about matters of common interest. But Art 19(2) lays down in a very peremptory manner that nothing of such freedom or the right to it, shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by Art 19(1) (a) in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. Giving a harmonious construction to these apparently conflicting features in the *right* Mukherjea J of the Supreme Court said in *Gopalan v. State of Madras* (h) that our Constitution attempts to strike a balance between individual liberty and social control. Banning D. H. Lawrence's *Lady Chatterly's Lover* in India, Hidayatullah J observed in *Ranjit Udeshi v. State of Maharashtra* (i) that Sec 292 of the Indian Penal Code manifestly embodies reasonable restrictions because the law against obscenity, of course, correctly understood and applied, seeks no more than to promote public decency and morality, though the learned Judge commented that "the world has certainly moved far away from the times when *Pamela*, *Moll Flanders*, *Mrs Warren's Profession* and even *Mill on the Floss* were considered immodest.....The world is now able to tolerate much more than formerly, having become inured by literature of different sorts. The attitude is not yet settled." See now the later decisions of the Supreme Court in film censorship cases (j) in respect of the film—*Satyam, Sivam, Sundaram*. Jurist Cowen in his Tagore Law Lectures on 'Individual Liberty and the Law' (1977) has aptly pointed out: "In the United States the law is very different. Justice Douglas has put characteristically that: "We have made our choice refusing to sacrifice freedom of the Press to the whims of Judges. We know that judges as well as editors can be tyrants and in *Pennekam v. Florida*, the Supreme Court of the United States reversed a State court conviction for the publication of articles attacking judicial integrity and performance. In *Garrison v. Louisiana*, the Supreme Court reversed a conviction for criminal libel for sharply critical statements on the motives and abilities of county court judges. In this case the court applied the rule of *New York Times v. Sullivan*, regarding judges as public officials within the ambit

Public Decency and Morality.

(f) A. I. R. 1950 S. C. 124.

(g) A. I. R. 1960 S. C. 554.

(h) A. I. R. 1950 S. C. 27.

(i) A. I. R. 1965 S. C. 881.

(j) *Raj Kapoor v. Delhi Administration*, A. I. R. 1980 S. C. 258 and *Raj Kapoor vs Laxman*, A. I. R. 1980 S. C. 605.

of that rule.” Referring to India’s Art 19, Cowen pointed out: “Art 19(2) of the Constitution is quite explicit in affirming that nothing in Art 19(1) (a) setting forth a guarantee of freedom of speech shall affect the operation of any existing law or prevent the State from making any law relating to contempt of court.” Mr Justice Mukherjea said in the broadest terms in *Brahma Prakash Sharma v. Uttar Pradesh* (k) that any publication calculated to interfere with the due course of justice or proper administration of law by such court.....can be punished summarily as contempt and Justice Douglas in his Tagore Lectures had pointed specifically to the strictness of the Indian law of contempt as compared with the American law.

In this connection it is important to note that after the appointment in 1953 of the States Re-organisation Commission in India, the Akali Party in the Punjab started a campaign for the partition of the State of Punjab on communal and linguistic basis. Two newspapers, the *Daily Pratap* and the *Vir Arjun* opposed the Akali demand for partition. A tension followed and the State of Punjab passed the Punjab Special Powers (Press) Act, 1956 in October, 1956 and the President assented to it. Examining the validity or otherwise of the 1956 Act, upon two petitions under Art 32, the Supreme Court found that the statute authorised the State Government or its delegated authority to impose pre-censorship and enable the Government or the authority, in case of disobedience, to order the seizure of all copies of any publication and of the printing press or other instrument or apparatus used in the publication and the Act provided for punishment for the contravention of any of its provisions. Before the Supreme Court in the case *Virendra v. State of Punjab* (l), the provisions were challenged on the ground of giving arbitrary and uncontrolled discretion to the Government to curtail freedom of speech on its subjective satisfaction. The Court said that in the tension prevailing, the conferment of the powers to be exercised on the subjective satisfaction of the Government was not an unreasonable restriction. The Government which is in possession of all the material facts was the best authority to determine the time when, and the extent to which the restrictions were to be imposed and to take anticipatory action. Sec 3 of the Act was however, struck down as *ultra vires* being invalid as it neither laid down any time limit for the operation of the order nor did it provide for any representation to the Government against the order as safeguards in those respects were essential. These safeguards had been provided in another statute, namely, the Prevention of Publication of Objectionable Matters Act, 1976 which had closely followed the model of the Punjab Act. The 1976 Act was put beyond challenge as to its unconstitutionality by including it in the 9th Schedule of the Constitution. This Act was subsequently repealed in April, 1977 and then effaced from the statute book. But the Supreme Court while it upheld the provisions of Sec 144 of

(k) 1953 S. C. R. 1169

(l) A. I. R. 1957 S. C. 896.

the Code of Criminal Procedure in the case *Babulal Parate v. Maharashtra* (m) struck down that part of the Sec 144 which had authorised the State Government to extend the life of the prohibitory order beyond two months in the absence of any safeguards and provision for the aggrieved party to make representation to the Government against the order (n). The section has since been amended removing the lacunae. Fundamental rights cannot be made to depend on the presumed fairness and integrity of officers of the State (o). A statute when found invalid as being unreasonable is not saved by its being administered in a reasonable manner (p).

So far as the question of protection of the publication of proceedings of Parliament and State Legislatures is concerned the latest position is contained in Act 361A as inserted by the Constitution (44-th Amendment) Act, 1978 which says—

(1) No Person shall be liable to any proceedings, civil or criminal, in any court in respect of the publication in a newspaper of a substantially true report of any proceedings of either House of Parliament or the Legislative Assembly, or, as the case may be, either House of the Legislature of a State, unless the publication is proved to have been made with malice:

Protection of Publication of Proceedings of Parliament and State Legislatures.

Provided that nothing in this clause shall apply to the publication of any report of the proceedings of a secret sitting of either House of Parliament or the Legislative Assembly, or, as the case may be, either House of the Legislature of a State.

(2) Clause (1) shall apply in relation to reports or matters broadcast by means of wireless telegraphy as part of any programme or service provided by means of a broadcasting station as it applied in relation to reports or matters published in a newspaper.

We may now recall what Blackstone said, “The King is not bound by any act of Parliament, unless he be named therein by special and particular words. The most general words that can be devised.....affects not him in the least, if they may tend to restrain or diminish any of his rights or interests. For it would be of the most mischievous consequence to the public, if the strength of the executive power were liable to be curtailed without its own express consent by constructions and implications of the subject. Yet, when an Act of Parliament is expressly made for the preservation of public rights and the suppression of public wrongs, and does not interfere with the established rights of the Crown, it is said to be binding as well upon the king as upon the subject; and likewise, the king may take the benefit of any particular act, though he be not

Crown is not bound by Statute.

(m) A. I. R. 1961 S. C. 884.

(n) *State of Bihar v. K. K. Misra*, A.I.R. 1971 S. C. 1667.

(o) *Kishen Chand v. State of Rajasthan*, A. I. R. 1961 S. C. 705.

(p) *Collector of Customs v. Sampathu Chetty*, A.I.R. 1962 S. C. 316.

especially named." (Blackstone, Commentaries, Vol 1, 261-262). But the proposition that whenever a statute is enacted for the public good, the Crown must be held to be bound by its provisions cannot now be regarded as sound except in a strictly limited sense. As Lord Du Parcq observed: Every statute might be supposed to be 'for the public good', at least in intention, and even when it is apparent that one object of the legislature is to promote the welfare and convenience of a large body of the King's subjects by giving extensive powers to a local authority, it cannot be said, consistently with the decided cases, that the Crown is necessarily bound by the enactment. The apparent purpose of the statute is one element, and may be an important one, to be considered when an intention to bound the Crown is alleged. If it can be affirmed that, at the time when the Statute was passed and received the royal sanction, it was apparent from its terms that its beneficent purpose must be wholly frustrated unless the Crown was bound, then it may be inferred that the Crown has agreed to be bound (q). Our Supreme Court has approved and accepted these principles (r).

To go back to the past, as reminded by Ilbert, in addition to statutory powers the Governor-General in Council enjoyed such of the powers, prerogatives, privileges and immunities appertaining to the Crown as were appropriate to the case and consistent with the system of law in force in India. Thus it had been decided that the rule that the Crown is not bound by a statute unless expressly named therein applied also to India. In this connection Ilbert refers to *Secretary of State for India in Council v. Bombay Landing & Shipping Co* (5 Bom. H. C. Rep. O. C. J. 23); *Ganpat Pataya v. Collector of Canara* (I. L. R. 1 Bom 7); *Secretary of State for India v. Mathurabhai* (I. L. R. 14 Bom 213, 218) and *Bell v Municipal Commissioners of Madras* (I. L. R. 25 Mad 457).

The Governor-General in Council had also, by delegation, powers of making treaties and arrangements with Asiatic States, of exercising jurisdiction and other powers in foreign territory and of requiring and ceding territory (s). Moreover the Government of India had powers, rights, and privileges derived not from the English Crown but from the Native Princes, whose rule it had superseded (t).

Sec. 33 of the Govt. of India Act 1919 had provided that subject to the provisions of the Act and the rules made thereunder, the superintendence, direction and control of the Civil and Military Government of India was vested in the Governor General in Council who was required to pay due obedience to all such order as he might receive from the Secretary of State. In order to make this

Statutory Immunities.

(q) *Province of Bombay v. Municipal Corporation*, 1946 L. R. 73 I. A. 271.

(r) *Director of Rationing v. Corporation*, 1961 1-S. C. R. 158; *State of Bihar v. Rani Sonabati*, 1961 1-S. C. R. 728; *State of Punjab v. Okara* 1964 II S. C. R. 451.

(s) See *Damodhar Khan v. Deoram Khanji*, I. L. R. 2 All-1, *Hemchand Devchand v. Azam Sakarlal Chhotanlal*; *The Taluka of Kosda Dangani v. The State of Gondal* (1906) A. C. 212.

(t) *The Government of India* by Ilbert p. 203 (3rd Edn.)

sweeping provision fully effective, Sec. 110 of the Act provided exemption of the Governor General, each governor and each of the members of the Executive Council and minister from being subjected to the original jurisdiction of any High Court by reason of anything counselled, ordered or done by any of them in his public capacity and from being arrested or imprisoned in any suit or proceeding. The Government of India Act 1935 had categorically laid down, in a more precise language in Sec. 306 that no proceedings whatsoever shall lie in, and no process whatsoever shall issue from any Court in India against such persons or even the Secretary of State whether in a personal capacity or otherwise, and except with the sanction of His Majesty in Council no proceedings whatsoever shall lie in any Court in India against any person who has been the Governor General, the Governor of Province, or the Secretary of State in respect of anything done or omitted to be done by any of them during his term of office in performance or purported performance of the duties thereof.

Indemnity for past acts provided in Sec 270 of the Government of India Act, 1935 was, however, omitted by the India (Provisional Constitution) Order, 1937, though the provisions relating to public servants against prosecution and suits were maintained. No such immunity is however provided in the Constitution of India. On the other hand statutes have been passed to launch prosecution against past ministers and people who held high offices including even the Prime Minister and provisions were made for setting up Special Courts for the said purposes.

Section 132 of the Government of India Act, 1919 provided that all treaties made by the East India Company, so far as they were in force at the commencement of the Act, were binding upon His Majesty, and all contracts made and liabilities incurred by the East India Company may, so far as they were outstanding at the commencement of this Act, be enforced by and against the Secretary of State in Council. Section 44 of the Act, however, restricted the power of the Governor General in Council to make war or treaty. It could declare war or make treaty or commence hostilities or enter into any treaty for making war against any prince or state in India or enter into any treaty for guaranteeing the possession of any such prince or state. When the Governor General in Council commences any hostilities or makes any treaty, he shall forthwith communicate the same, with reasons therefor, to the Secretary of State. Section 285, 286 of the Government of India Act, 1935 spoke of the relation between the Crown and the Indian States and subject, in the case of a Federal State, to the provisions of the Instrument of Accession of that State, nothing in the Act of 1935 affected the rights and obligations of the Crown in relation to the Indian States. As the country marched to its freedom the patience and iron will of Sardar Vallabhai Patel brought about the merger of Indian States within the Union of India. Ultimately, the privy purses to the Indian princes were abolished which had

led to the legal battle in *Madhav Rao v. Union of India* (u). Arts 291 and 362 of the Constitution were repealed by its 26th Amendment and new Art 363A was inserted by which recognition granted to Rulers of Indian States ceased and privy purses were abolished. Under the Constitution the subjects of foreign affairs and all matters which bring the Union into relations with any foreign country and entering into treaties, agreements and conventions with foreign countries and of War and Peace are in List I i.e., the Union List of the 7th Schedule of the Constitution. Though Art 2 of the Constitution says that the Parliament may by law admit into the Union, or establish, new States on such terms and conditions as it thinks fit and Art 3 speaks of formation of new States and alteration of areas, boundaries or names of existing States, it cannot cede any Indian territory to a foreign State (v).

Among the non-statutory powers which the Government of India enjoyed as representing the Crown, which was the sovereign power in this country then was the power to commit what are known as "acts of State," for which it was not answerable to any court of law. The latter is competent to determine whether an act purporting to be an "act of State," is in fact such an act. But once it is determined that it is an act of State, it can offer no redress to an aggrieved party. A number of cases has been decided on this point, the most important of which are given in the footnote (w).

An Act of State as defined by Sir Fredrick Stephen, is an act injurious to the person or property of some person who is not at the time of that act a subject of Her Majesty; which act is done by a representative of Her Majesty's authority and is either sanctioned or subsequently ratified by Her Majesty. It is therefore a wrong done to an alien under a state policy and the wrong is not amenable to be remedied in any municipal Court. It is an arbitrary act done under the Sovereign power and it is without any remedy. Such illegal act cannot be done by the Sovereign against its own subject under colour of 'Act of State (x)' or against a friendly alien residing in British territory (y). An act, as Ivor Jennings puts it, done by a British Officer or under the authority of the Crown, in a foreign country and against a foreigner would be an act of State, and not actionable, even if it would have been actionable in other circumstances. Our Supreme Court has

(u) A. I. R. 1971 S. C. 530.

(v) *Re: Berubari Union*, A. I. R. 1960, S. C. 845 and Art 1 of the Constitution.

(w) *Nobob of Carnatic v. The East India Company*, (1793) 1 Ves. Jr. 371; 2 Ves. J. 56; 3 Bro. C. C. 292; 4. Bro. C. C. 180.

The East India Company v. Syed Ally, (1827) 7 M. I. A. 555. *Heerachand Bedreechand v. Elphinstone*, 2 State Trials N. S. p. 379. *Secretary of State for India in Council v. Kamachee Boye Sahaba*, (1859) 13 Moo. P. C. 22. *The Ex-Raja of Coorg v. The East India Company*, (1860) 29 Beav. 300. *Raja Salig Ram v. Secretary of State for India in Council*, (1872) L. R. Ind. Appl. Supp. Vol. p. 119. See also *Forester and others v. Secretary of State for India in Council* (1872) L. R. I. A. Supp. Vol. p. 10. *Saurashtra v. Memon Haji Ismail*, A. I. R. 1956 S. C. 1383 (Junagad Case)

(x) *Nissan v. Attorney General*, 1970 A. C. 170.

(y) *Johnstone v. Pedlar*, 1921 A. C. 262.

also observed that it is impossible for a sovereign to exercise an Act of State against its own subject" (z).

Speaking on the development of the Act of State, Subba Rao J of the Supreme Court said in *State of Gujarat v. V. F. B. Mithibarwala* (a) that an act of State is an arbitrary act not based on law, but on the modern version of might is right. It is an act outside the law. In the primitive society when a tribe conquered another tribe, the properties of the vanquished were at the mercy of the conqueror. The successful army used to pillage, plunder and commit acts of arson and rape. When society progressed, the doctrine of Act of State was evolved, which really was a civilized version of the primitive acts of pillage and plunder of the properties of the conquered tribe. But the further progress of civilization brought about, by custom and agreement, factual recognition of pre-existing rights of the people of the conquered State. There are two different lines of approach—one adopted by the imperialistic nation and the other by others who were not. That divergence was reflected in English and American Courts. All the jurists of international law recognise the continuity of title to immovable property of the erstwhile citizens of ceding State after the sovereignty changed over to the absorbing State. The learned judge quoted from Oppenheim's International Law where it is said: "It must be specially mentioned that, as far as the Law of Nations is concerned, the subjugating State does not acquire the private property of the inhabitants of the annexed territory. Being now their Sovereign, it may indeed impose any burden it pleases on its new subjects—it may even confiscate their private property, since a sovereign State can do what it likes with its subjects but, subjugation itself does not by International Law affect private property." Thus an Act of State derives its authority not from a municipal law but from ultra-legal or supra-legal means and as such the Municipal Courts have no power to examine the propriety or legality of an act which comes within the ambit of an 'Act of State'. Whether the act of State relates to public rights or to private rights, the result is the same. It is beyond the jurisdiction of the Municipal Courts.

Arbitrary Exercise of
Sovereign Power.

Similarly by virtue of the treaty by which the new territory has been acquired it may have been stipulated that the pre-existing rights of old inhabitants shall be respected, but such stipulations cannot be enforced by individual citizens because they are not parties to those stipulations. Where the Municipal Courts have been recognised by the new Sovereign, such courts have the power and jurisdiction to investigate and ascertain only such rights as the new sovereign has chosen to recognise or acknowledge by legislation, agreement or otherwise (b). So it was very correctly summed up by Hidayatullah J of the Supreme Court in *Mithibarwala's* case by saying that the essence of an Act of State is an arbitrary exercise of sovereign power on principles which are paramount to the Municipal Law,

(z) *Virendra v. State of Uttar Pradesh*, 1955 (1) S. C. R. 415.

(a) 1964 (II) S. C. A. 563 at page 607; AIR 1974 S.C. 1043.

(b) See, *Promod v. State of Orissa*, 1961, I Supp S. C. R. 405.

against an alien and the exercise of the power is neither intended nor purports to be legally founded. A defence that the injury is by an Act of State does not seek justification for the Act by reference to any law, but questions the jurisdiction of the court to decide upon the legality or justice of the action. The Act of State comes to an end only when the new sovereign recognises either expressly or impliedly the rights of the aliens. It does not come to an end by any action of subordinate officers who have no authority to bind the new sovereign. Till recognition, either express or implied, is granted by the new sovereign, the Act of State continues. In the words of Fletcher Moulton L. J. "An Act of State is essentially an exercise of sovereign power and hence cannot be challenged, controlled or interfered with by municipal courts. Its sanction is not that of law, but that of sovereign power, and whatever it be, municipal courts must accept it as it is without question. But it may, and often must, be part of their duty to take cognizance of it. For instance, if an act is relied on as being an Act of State, and as thus affording an answer to claims made by a subject, the courts must decide whether it was in truth an Act of State, and what was its nature and extent"(c).

What was the position of the Crown in India as regards its liability to be sued in a court of law? "It may be stated," says Anson, "as a general rule, that no action can be brought against a sovereign in person." In England when a subject had a cause of action, legal or equitable, against the Crown, he could not proceed by suit, but had to adopt a special procedure called the Petition of Right. Even this procedure was available to the subject in certain cases but not in all (d).

But still the Rule of Law remains an essential characteristic of the English Constitution. This Rule of Law means absence of arbitrary power of the Executive and the sovereignty of Parliament in contrast to the state of affairs in the totalitarian States with their apparatus of secret police and people's Courts administering not law, but the orders of those who can dictate the people's will. Prior to 1947, not only, was the Crown beyond the reach

Crown Proceedings
Act, 1947.

of the Courts but also the Government departments could not be sued. Thus the aggrieved person had no legal remedy either against the Crown or against

Government Departments. To remove the anachronism between this position and the Rule of Law, the British Parliament enacted the Crown Proceedings Act, 1947. By virtue of this Act, Courts in the United Kingdom provide remedies against injuries for wrongful acts committed by the administrative authority or its officers. The Crown exercises its legal powers through its servants. In other words a minister performs his function as a servant of the Crown and so does a Civil servant. The Crown can therefore be sued for breach of contract against the department concerned and if no appropriate department can be identified the suit may be brought against the Attorney-General. The Crown may similarly be sued for breach of statutory

(c) *Salaman v. Secretary of State for India*, 1906 1-K. B. 613.

(d) *Feather v. The Queen*, 6 B. & S. 257 at 293, per Cockburn, C.J.

duty and it is subject to the same liabilities as an ordinary private person. The Crown would also be liable for tort or civil wrong when it exercises its functions wrongly or without lawful authority interferes with the person or property of any Citizen. If an administrative officer commits a crime in the course of his employment he is liable to be tried in the ordinary courts and punished as an ordinary citizen. The Act of 1947 provides, to be precise, that the Crown shall be subject to all those liabilities in law to which, if it were a private person of full age and capacity, it would be subject:—(a) in respect of torts committed by its servants or agents; (b) in respect of any breach of those duties which a person owes to his servants at common law by reason of being their employer; and (c) in respect of breach of the duties affecting at common law the ownership, occupation, possession or control of property.”

Commenting on the present day legal position of the Acts of Crown, Ivor Jennings, has aptly said: “The common law has a maxim that the King can do no wrong. Most of its consequences have been swept away by recent legislation, but it is still true that the law applying to the Crown and its servants is different from the law applying to private persons, even in respect of Civil liability. No proceedings can be brought against the Queen herself, for the Courts are her Courts, they act in her name, and their powers were originally derived from the authority of the Crown, though they have long since successfully asserted their independence, and in the main their functions are now provided for by legislation. But, generally speaking, proceedings can now be brought against the Crown in respect of acts done by the Queen’s servants, by taking proceedings against the appropriate Government Department or, where there is no appropriate Department or reasonable doubt about which Department is appropriate, they may be brought against the Attorney General; and a Special procedure is laid down by the Crown Proceedings Act, 1947 for securing damages and costs from the Crown.” (Law and the Constitution, p. 222).

In India also, no suit or action lay against the Crown. But one having a claim against the Crown was not without remedy in a court of law. By Statute 21 & 22 Vict. C. 106 sec. 2, the territories and revenues of India were transferred from the East India Company to the Crown. In order, however, that no one should be deprived of any right or claim which he might have had against the Company, Position in India sec. 65 of the Statute provided that the Secretary of State in Council as a body corporate might be sued in all cases in which the Company might have been sued. It was further provided by sec. 68 that “neither the Secretary of State nor any member of the Council shall be personally liable in respect of any contract entered into under the authority of this Act or other liability of the said Secretary of State or Secretary of State in Council in their official capacity; but all such liabilities, and all costs and damages in respect thereof shall be satisfied and paid out of the revenues of India.”

The position then was this that the Secretary of State in Council was liable to be sued in all cases in which suits might have lain against the East India Company. To determine therefore under what circumstances a suit could lie against the Secretary of State in Council, we have first of all to find out the circumstances under which the Company was liable to be sued.

The position of the East India Company was of an anomalous character. They started as a trading corporation, but in course of time they came to acquire extensive territories and assumed the function of a sovereign power in those territories. Parliament by legislation allowed them to remain in possession of the territories acquired by them as also to exercise the functions of government therein, subject however, "to the undoubted sovereignty of the Crown of the United Kingdom of Great Britain and Ireland in and over the same" (53 Geo. III c. 155). Thus the Company came to be invested with powers and privileges of a twofold character, namely, power to carry on trade as merchants, and (subject only to the prerogative of the Crown to be exercised by the Board of Commissioners for the Affairs of India) power to acquire and retain and govern territory, to raise and maintain armed forces by sea and land and to make peace or war with the natives of India. It has been held in a large number of cases that the Company was subject to the jurisdiction of municipal courts in all matters and proceedings undertaken by them as a private trading company (e). But that they were not so subject in matters and proceedings undertaken by them in their character of territorial Sovereign (f). No doubt on account of the two-fold capacity of the Company, it was extremely difficult to ascertain whether any particular act was to be attributed to the exercise of their sovereign power or to their functions as a trading corporation. Once however it was established that the act complained of belonged to the former category no court was entitled to question its propriety.

This being the position of the East India Company, it follows that the Secretary of State for India in Council was liable to be sued only in respect of those acts done in the conduct of undertakings which might be carried on by private individuals without sovereign power, but not in respect of acts which can only be done by sovereign authority. This principle was laid down in the well-known case of *P. & O. Co. v. Secretary of State* (g) and has since been followed in a number of cases (h).

Similar provisions were also made in the Government of India Act, 1915, which was enforced in 1919. Section 32 of this Act laid down that the Secretary of State in Council may sue and be sued by the name of

(e) *Moodalay v. The East India Company*, 1 Bro. C. C. 469.

(f) *Gibson v. The East India Company*, 5 Bing. (N. S.) 262. *The Ex-Raja of Coorg v. The East India Company*, 29 Beav. 300.

(g) 5 Bom. H. C. R. Appendix A; Bourke 166 (A.O.C.J.).

(h) *Nobin Chandra De v. Secretary of State for India*, I. L. R. 1 Cal. 111 *Jehangir M. Cursetji v. Secretary of State for India in Council* I. L. R. 27 Bom. 189. *Shivabhajan v. Secretary of State for India*, I. L. R. 28 Bom. 314.

the Secretary of State in Council as a body corporate and every person should have the same remedies against it as he might have had against the East India Company if the Government of India Act, 1858 and this Act of 1919 had not been passed. The property for the time being vested in His Majesty for the purposes of the government of India shall be liable to the same judgments and execution as it would have been liable in respect of liabilities lawfully incurred by the said Company. But all such liabilities, and all costs and damages in respect thereof, shall be borne by the revenues of India. As the structure of the administration changed with the coming into force of the Government of India Act, 1935 the provisions relating to suits and proceedings underwent a change consistent therewith. Section 176 of the 1935 Act had provided that the Federation may sue or be sued by the name of the Federation of India and a Provincial Government may sue or be sued by the name of the Province, and, without, prejudice to the subsequent provisions of Chapter III of Part VII of the Act, may, subject to any provisions which may be made by Act of Federal or Provincial Legislature enacted by virtue of powers conferred on that Legislature by this Act of 1935, sue or be sued in relation to their respective affairs in the like cases as the Secretary of State in Council might have sued or been sued if the 1935 Act had not been passed. The relevant provisions for suit and proceedings in the Constitution of India follow the above pattern both in language and spirit as Art 300 lays down: The Government of India may sue or be sued by the name of the Union of India and the Government of State may sue or be sued by the name of the State and may, subject to any provisions which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution, sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been passed. The Dominion referred to is one of the two dominions, India and Pakistan, created earlier, by the Indian Independence Act, 1947 (10 & 11 Geo. VI, c. 30) passed by the British Parliament on 18th July 1947. It was an Act to make provision for the setting up in India of two independent dominions, to substitute other provisions for certain provisions of the Government of India Act, 1935, which apply outside those dominions, and to provide for other matters consequential on or connected with the setting up of those dominions. Relevant to our present topic Section 15 of this Act of 1947 is important as it relates to legal proceedings by and against the Secretary of State. It is not necessary to go into the details of this section but it will be of interest to note what sub-section (1) of Sec 15 reads. It says: Notwithstanding anything in this Act, and in particular, notwithstanding any of the provisions of the last preceding section, any provision of any enactment which, but for the passing of this Act, would authorise legal proceedings to be taken, in India or elsewhere, by or against the Secretary of State in respect of any right or liability of India or any part of India shall cease to have effect on the

appointed day (Aug 15, 1947), and any legal proceedings pending by virtue of any such provision on the appointed day shall, by virtue of this Act, abate on the appointed day, so far as the Secretary of State is concerned. The Indian Independence Act 1947 and the Government of India Act, 1935 were finally repealed by Art 395 of the Constitution of India. Before instituting any suit against the Union of India or against any of the States, one has to follow the procedure laid down in Section 80 of the Code of Civil Procedure.

CIVIL SERVICES IN INDIA

What is the position of the servants of the Government in this country? The English law on the point is quite clear. In *Dunn v. The Queen*, it was laid down "that servants of the Crown, civil as well as military, except in special cases where it is otherwise provided by law, hold their offices during the pleasure of the Crown." This means that they can be dismissed, suspended or retired at the pleasure of the Crown and that no municipal court will question the propriety of the measure. The courts in England have gone so far as to say that the Crown has an inherent power to dismiss any of its servants, unless it has been taken away in any particular case by Parliament and "that if any authority representing the Crown were to exclude such a power by stipulation, that would be a violation of the public policy of the Country and could not derogate from the power of the Crown" (a).

In India there were certain officials who held their office during the pleasure of the Crown e.g., judges of the several High Courts, members of the Civil Service. What about the rest? The question was discussed in *Jehangir v. Secretary of State* (b). There the Pleasure Theory learned judge after going through all the authorities appears to hold that those public servants who are charged with functions which are in themselves the acts or attributes of sovereignty hold their office during the pleasure of the Government, but that those who are not so charged hold their office in terms of the contract entered into by them with the Government (per Tyabji, J., 213).

The power to dismiss servants at pleasure includes the power to retire them; as also to suspend them at pleasure (c).

A public servant who has been dismissed is not entitled to sue for a declaration that there were no good grounds for dismissing him, nor for a declaration that his dismissal was in contravention of rules framed by Government, nor for a declaration that his dismissal should have been notified (d).

The Government of India Act, 1833 (3 & 4 Will IV, C. 85) had provided in Sec 74 of the Statute that it was lawful for His Majesty to remove or dismiss any person holding any office or employment under the East India Company

(a) *Dunn v. The Queen* (1896) 1 Q. B. p. 116 at 118.

(b) I. L. R. 27 Bom. 189.

(c) *Grant v. Secretary of State for India* L. R. 2 C. P. D. 445. See also *Voss v. Secretary of State for India*, 33 Cal. 669. *Sarat Chandra Das v. Secretary of State*, I. L. R. 38 Cal. 378.

(d) *Ram Das Hazra v. Secretary of State* 18 C. W. N. p. 106.

and Sec 75 thereof provided that the Court of Directors were also competent to remove or dismiss any officer or servant of the Company. At the same time Sec 87 of the same Statute of 1833 laid down that no native of the terri-

Indianisation of Civil Services

tories (of India) nor any natural born subject of His Majesty resident therein shall by reason only of religion, place of birth, descent, colour or any of them, be disabled from holding any place, office or employment under the said company. The law makers in the United Kingdom had then laid down the seeds of Indianisation of the Civil Services in our country nearly 150 years ago. But the spirit so expressed in the statute was not given a free play for several decades and Mr. Stanhope, a British Under Secretary of State for India in the course of his Budget speech on the floor of the U. K. Parliament lamented in 1879 that the effect given to the aforesaid policy for more than 40 years had been spasmodic, unsystematic and altogether incomprehensible by the mass of the natives while a great increase had taken place in the number of Europeans in some branches of the Public service, and various other acts had given rise to the idea that the policy announced had been abandoned". So the Under Secretary stated in 1879 that it had now been decided not only that higher offices should be thrown open then those for which natives had hitherto been eligible, but also that there should be a diminished number of covenanted Civilians sent from this country, so that a larger occupation might be given to the natives". In passing it may be mentioned that in expressing his mind in the manner he did the Under Secretary was fighting against the protests raised by a certain portion of the English Press which vigorously protested against the appointment of natives to high positions. The reaction to such...protests was equally stupendous in India and 100 years ago, or rather at the right moment, the *Statesman* of Calcutta in its editorial on July 19, 1879 growled against such protest and condemned it as strongly as possible in sharp and unequivocal language and answered the comments which appeared in the Pall Mall Gazette (London) by specifically telling the English Press that it was violently wrong and mischievous to say (as the English Press did) that the Orientals had 'defective morality' and were always mixed up with a set of family relations and their kith and kin were a legion and so they had difficulty in administering even justice and holding the balance fairly. The *Statesman* of Calcutta reminded the English Press of the "important fact that natives were even then largely appointed to offices in which they were required to administer justice. The vast majority of original Civil suits were being tried by the native Munsiff or Subordinate Judge, and not by the European District Judge. Suits of great importance and value were being disposed of by native Judicial Officers." The *Statesman*, therefore, raised the voice of India and echoed what every Indian had been demanding. Mr. Stanhope was encouraged and the sentiments he expressed and the proposals he renewed and placed before the Parliament were gradually fulfilled and more Indians were drafted under the Civil Services and the Indians proved their mettle in taking upon themselves the burdens

and responsibilities of high and important offices in their own country. A historical necessity however followed for political and administrative reforms in the Country and different statutes were passed by the Parliament in England relating to the governance of India and specific provisions as to the conditions of service of the Civil Servants in India were made for the first time in the Government of India Act, 1919. Sec 96-B of the 1919 Act read as follows:

(1) Subject to the provisions of this Act and of rules made thereunder, every person in the civil service of the Crown in India holds office during His Majesty's pleasure, and may be employed in any manner required by a proper authority within the scope of his duty, but no person in that service may be dismissed by any authority subordinate to that by which he was appointed, and the Secretary of State in Council may (except so far as he may provide by rules to the contrary) reinstate any person in that service who had been dismissed.

Section 96-B Govt. of India Act, 1919.

If any such person appointed by the Secretary of State in Council thinks himself wronged by an order of an official superior in a governor's province, and on due application made to that superior does not receive the redress to which he may consider himself entitled, he may, without prejudice to any other right of redress, complain to the Governor of the province in order to obtain justice, and the governor is hereby directed to examine such complaint and require such action to be taken thereon as may appear to him to be just and equitable.

(2) The Secretary of State in Council may make rules for regulating the classification of the civil services in India, the methods of their recruitment, their conditions of service, pay and allowances, and discipline and conduct. Such rules may, to such extent and in respect of such matters as may be prescribed, delegate the power of making rules to the Governor General in Council or to local governments, or authorise the Indian legislature or local legislatures to make laws regulating the public services:

Provided that every person appointed before the commencement of the Government of India Act, 1919, by the Secretary of State in Council to the civil service of the Crown in India shall retain all his existing or accruing rights, or shall receive such compensation, for the loss of any of them as the Secretary of State in Council may consider just and equitable.

(3) The right to pensions and the scale and conditions of pensions of all persons in the civil service of the Crown in India appointed by the Secretary of State in Council shall be regulated in accordance with the rules in force at the time of the passing of the Government of India Act, 1919. Any such rules may be varied or added to by the Secretary of State in Council and shall have effect as so varied or added to, but any such variation or addition shall not adversely affect the pension of any member of the service appointed before the date thereof.

Nothing in this section or in any rule thereunder shall prejudice the

right to which any person may, or may have, become entitled under the provisions in relation to pensions contained in the East India Annuity Funds Act, 1874.

(4) For the removal of doubts it is hereby declared that all rules or other provisions in operation at the time of the passing of the Government of India Act, 1919, whether made by the Secretary of State in Council or by any other authority, relating to the civil service of the Crown in India, were duly made in accordance with the powers in that behalf, and are confirmed, but any such rules or provisions may be revoked, varied or added to by rules or laws made under this section.

Read again the provisions of Section 240. in the Government of India Act, 1935.

Tenure of office of persons employed in civil capacities in India.

(1) Except as expressly provided by this Act, every person who is a member of a civil service of the Crown in India, or holds any civil post under the Crown in India, holds office during His Majesty's pleasure.

(2) No such person as aforesaid shall be dismissed from the service of His Majesty by any authority subordinate to that by which he was appointed.

(3) No such person as aforesaid shall be dismissed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him:

Provided that this sub-section shall not apply :

(a) Where a person is dismissed or reduced in rank on the ground of conduct which had led to his conviction on a criminal charge; or

(b) Where an authority empowered to dismiss a person or reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to give to that person an opportunity of showing cause.

(4) Notwithstanding that a person holding a civil post under the Crown in India holds office during His Majesty's pleasure, any contract under which a person, not being a member of a civil service of the Crown in India, is appointed under this Act to hold such a post may, if the Governor-General, or, as the case may be, the Governor, deems it necessary in order to secure the services of a person having special qualifications, provide for the payment to him of compensation, if before the expiration of an agreed period that post is abolished or he is, for reasons not connected with any misconduct on his part, required to vacate that post.

Section 96-B of the Government of India Act, 1915, for the first time in 1919, by an amendment, gave statutory recognition to the doctrine of pleasure or the prerogative of the Crown, but it was made subject to a condition that no person in the service might be dismissed by an authority subordinate to that by which he was appointed. Section 240 of the Government of India Act, 1935, imposed another limitation, namely, that a reasonable opportunity of showing cause against the action proposed to be taken in regard

to a person must be given to him. But neither of the two Acts empowered the appropriate legislature to make a law abolishing or amending the said doctrine. The Constitution of India practically incorporated the provisions of Sections 240 and 241 of the Government of India Act, 1935, in Arts. 309 and 310. The English doctrine has been enlarged in one direction and restricted in another; while the Parliament has no power to deprive the President of his pleasure, the said pleasure is made subject to two limitations embodied in Art. 311. The English concept is considerably modified to suit the conditions of our country. Both Arts. 310 and 311 shall be read together, and if so read, it is manifest that the said doctrine is subject to the said two conditions. The limitations of the pleasure are therefore obvious. Art. 309 makes it competent for the President or the Governor, or their delegate, to make rules regulating the recruitment and prescribing the conditions of service of persons, under the Union and the State respectively, appointed to those services. The pleasure of the President or of the Governor mentioned in Art. 310 may therefore be exercised by such persons as they appoint and the pleasure has to be exercised in accordance with the rules so made. Art. 309 cannot therefore, impair or affect the pleasure of the President or of the Governor. There is thus no doubt that Art. 309 has to be read subject to Arts. 310 and 311 and that Art. 310 has to be read subject to Art. 311. It is significant that Art. 311 is not subject to any other provisions of the Constitution. Apart from historical evolution of the guarantee, there are inherent indications in the Constitutional provisions that it was not the intention of the Constitution makers to include in the expression "dismissed or removed" all terminations of employment. Guarantee of reasonable opportunity of showing cause against the action proposed to be taken in regard to a public servant, would be wholly inappropriate in case of superannuation, expiry of the contractual period of employment, expiry of the period of probation or temporary employment or resignation. It would be futile in such cases to provide for "showing cause". The use of the expression "action proposed to be taken in regard to him" also suggests that termination of employment is of the nature of penal action (e).

In cases of compulsory retirement the Court has to examine the presence or absence of such factors as stigma attached to the same and it involved loss of benefit already earned by the servant (f). It is of interest to note that in dealing with the question as to whether compulsory retirement amounted to removal or not, the tests which were applied were in regard to loss of benefit already accrued and the stigma attached to the civil servant. The Court upheld such retirement where the rule provided for compulsory retirement and it did not amount to removal under Art. 311(2) because it was another mode of retirement and it could be enforced only between the period

Compulsory Retirement.

(e) *Moti Ram Deka v. N. F. Railways*, 1964 II-S. C. A, 372.

(f) *Shyam Lal v. State of U. P.*, 1955 1-S. C. R. 26.

of age of superannuation prescribed and after the minimum period of service indicated in the rule had been put in (g). It was not without justification, therefore, that Subba Rao J. had commented in *Moti Ram Deka's* case that compulsory retirement before the age of superannuation cannot fall outside the scope of Art. 311 of the Constitution. The learned Judge said: Age of superannuation is common to all permanent civil servants; it depends upon an event that eventually happens by passage of time, unless the employee dies earlier or resigns from the post. It does not depend on the discretion of the employer or the employee; it is for the benefit of the employee who earns a well-earned rest with or without pensionary benefits for the rest of his life; it has, by custom and convention, become an inextricable incident of Government service; and it is an incident of a permanent post. Notwithstanding the rule fixing an age of superannuation, a person appointed to such a post acquires title to it. The same cannot be said of a compulsory retirement before the age of superannuation. It is not an incident of the tenure; it does not work automatically; it is not conceived in the interest of the employee; it is a mode of terminating his employment at the discretion of the appointing authority. In effect, the learned Judge further observed whatever may be the phraseology used in terminating the services of a Government employee, it is punishment imposed on him, for it not only destroys his title but also inevitably carries with it a stigma. Such a termination is only dismissal or removal within the meaning of Art. 311 of the Constitution.

If any Rule permits the appropriate authority to retire compulsorily a civil servant without imposing a limitation in that behalf that such civil servant should have put in a minimum period of service, that Rule would be invalid and the so-called retirement ordered under the said Rule would amount to removal of the civil servant within the meaning of Art 311(2) of the Constitution (h). There are, however, two exceptions to the protection afforded by Art 311(2) and they are——(a) where a permanent public servant is asked to retire on the ground that he had reached the age of superannuation which was reasonably fixed; and (b) that he was compulsorily retired under the Rules which prescribed the normal age of superannuation and provided a reasonably long period of qualified service after which alone compulsory retirement could be valid (i). The basis of this view is that for efficient administration it is necessary that public servants should enjoy a sense of security of tenure and that the termination of service of a public servant under a rule which does not lay down a reasonable period of qualified service is in substance removal under Art 311(2). The principle is that the rule relating to compulsory retirement of a Government servant must not only contain the outside limit of superannuation but there must also be a provision for a reasonably long period of qualified service which must be indicated with

(g) *State of Bombay v. Saubhag Chand*, 1958 S. C. R. 571.

(h) *Moti Ram Deka v. General Manager*, A. I. R. 1964 S. C. 600.

(i) *Gurdev Singh v. State of Punjab*, A. I. R. 1964 S. C. 1585.

sufficient clarity. To give an example, if 55 years have been specified as the age of superannuation and if it is sought to retire the servant before that period it should be provided in the rule that he could be retired after he has attained the age of 50 years or he has put in service for a period of 25 years. These were the observations of the Supreme Court in the case *T. S. Mankad v. State of Gujarat* (j) in which case applying these principles the Court held that by applying the Bombay Civil Service Rules, 1959, to the case of the appellant Mankad his service conditions have been revised to his disadvantage and as no previous sanction of the Central Government had been obtained to apply the Bombay Rules, the rules could not be applied to him and his compulsory retirement was invalid.

In *P. L. Dhingra v. Union of India* (k), Das C. J., speaking for the majority of a Bench of five judges of this Court, said :

“It has already been said that where a person is appointed substantively to a permanent post in Government service, he normally acquires a right to hold the post until under the rules, he attains the age of superannuation or is compulsorily retired and in the absence of a contract, express or implied, or a service rule, he cannot be turned out of his post unless the post itself is abolished or unless he is guilty of misconduct, negligence, inefficiency or other disqualifications and appropriate proceedings are taken under the service rules read with Art. 311(2). Termination of service of such a servant so appointed must *per se* be a punishment, for it operates as a forfeiture of the servant's right and brings about a premature end of his employment.”

“The proposition laid down in Dhingra's case (supra) by this Court mean that, unless a legally justifiable ground is made out for the termination of the service of a Government servant in permanent service, in the sense that he is entitled to remain in service until he reaches the age of retirement, he could be deemed in a given case to be punished by an apparently innocent order of termination of service. If however, the respondent belonged to a class of government servants the tenure or conditions of whose services was subject to the overriding and unqualified sway of the power to terminate his services at will, by reason of Article 310(1) of the Constitution we doubt whether he could claim to be a “permanent” servant, who would continue as of right, in service until he reaches the age of superannuation. At any rate, he could not be a “permanent” Government servant of the same class as one protected by Article 311 (1).”

Therefore under Art. 310, Government servants, high or low, hold service during the pleasure of the President or the Governor, as the case may be, subject to two well-known limitations namely, that they shall not be dismissed or removed by an authority subordinate to that by which they were appointed and secondly, that they shall not be dismissed or removed or reduced in

Doctrine of pleasure is modified.

(j) 1970 1 S. C. A. 138

(k) A. I. R. 1958 S. C. 36 at page 47.

(l) *Union of India v. K. S. Subramaniam*, A. I. R. 1976 S. C. 2333.

rank except after an enquiry into the charges clearly levelled against them and affording a reasonable opportunity of being heard in respect of the charge. We need not refer to the proviso to Art. 311(2) which deals with certain exceptional cases.

"Thus the pleasure doctrine under Art. 310 is conditioned by constitutional restrictions under Article 311. Under Art. 309 the appropriate legislature may regulate the recruitment and conditions of service and until so done the President or his delegate and the Governor or his delegate may make rules regulating the recruitment and conditions of service. The Act passed by the appropriate legislature and the rules made under Art. 309 will, however, be subject to the provisions of the Constitution which include Art. 311 and certainly the fundamental rights.

The pleasure doctrine under Art. 310 is in a way unoffendingly resuscitated with appropriate vigour towards the tail-end of the career of a Government servant under Rule 16(3) in the public interest. Compulsory retirement under the service rules is not by way of punishment, as understood in service jurisprudence, however unsavoury it may be otherwise. During the entire tenure of Government servants from the appointment till termination or retirement, as the case may be, there is an undoubted security for them against dismissal, removal or reduction in rank except in the manner laid down under Art 311(2), read with relevant laws or rules made under Art. 309" (m).

Although the I. C. S. ceased to function as a service of the Secretary of State for India after the 15th August 1947 when the Indian Independence Act, 1947, was enforced, its members were automatically appointed to corresponding posts under the Crown in connection with the affairs of the Dominion of India or of a Province by virtue of the provisions of sub-Clause (1) of clause 7 of the Indian (Provisional Constitution) Order, 1947. It would not be correct to say that the expression "who is a member of the I.C.S." would be meaningless and wholly inapplicable to any existing situation after the 15th August 1947. As a matter of fact the I.C.S. was not abolished in so many words and, on the otherhand, its members were given the right to continue in service on or after the 15th August 1947 under the same conditions of service as were applicable to them immediately before that date. This is clearly made out by the sub-sections (1) and (2) of Section 10 of the 1947 Act. Sub-sec. (1) enacted that the provisions of the Government of India Act 1935 ceased to operate in relation to appointments to the Civil Services of India, by the Secretary of State but sub-sec. (2) fully preserved the rights of and conditions of service applicable to holders of appointments already made by the Secretary of State, the only difference being that in place of the Secretary of State, the employers of the incumbents became the respective Governments concerned (n).

(m) *State of Uttar Pradesh v. Chandra Mohan Nigam*, A. I. R. 1977 S. C. 2411.

(n) *V. B. Raju v. Union of India*, A. I. R. 1980 S. C. 1671.

On the question of pay and allowances of a civil servant upon reinstatement the following case gives the correct guideline. By an order dated 21.4.1952 the Collector of Jhansi suspended appellant Narain Sharma and commenced an inquiry. Thereafter accepting the recommendations of the Commission, the Government of Uttar Pradesh dismissed the appellant from Service by an order dated 16.9.1953. Narain Sharma then filed a civil suit in the Court of the Civil Judge, Lucknow in 1954 challenging the legality of the dismissal. The Civil Judge dismissed the suit but on appeal the High Court decreed the suit and granted a declaration that the order of dismissal dated 16.9.1953 was void, in operative and illegal and the appellant must be deemed to continue in service. The appellant was then reinstated by the Government under a notification dated March 30, 1959 and he took charge of his office on 28.4.1959. He then applied to the Accountant General of Uttar Pradesh for payment of arrears of salary and allowances due to him. The appellant was again suspended and he moved the High Court against it under Art 226 of the Constitution and claimed full pay and allowances for the period of suspension. When the matter came up before the Supreme Court (o), the Court observed:

Pay of Public Servant
when Dismissal is
Set Aside

The High Court in dealing with the appellant's claim to salary during the period of his suspension pending the earlier enquiry observed that there was no justification for "not granting the appellant his full pay" for the period after the date of the suit. But the counsel for the State of Uttar Pradesh asserted that it was open to the State notwithstanding the direction, to award as remuneration to the appellant for the period for which he was under suspension any amount which on a reconsideration of the matter in the light of the relevant rules and after hearing the appellant the State Government considers just and proper. This power, counsel contended, arises by virtue of Rule 54 of the Fundamental Rules framed by the State of Uttar Pradesh under the authority. Counsel said that it was because of this rule that the High Court directed the State Government to reconsider the matter in the light of the relevant rules.

In our view, this contention is wholly misconceived. Rule 54, as amended in 1958, stands as follows:

"54 (1) When a Government servant who has been dismissed, removed or suspended is reinstated, the authority competent to order the reinstatement shall consider and make a specific order—(a) regarding the pay and allowances to be paid to the Government servant for the period of his absence from duty and (b) whether or not the said period shall be treated as a period spent on duty.

(2) Where such competent authority holds that the Government servant has been fully exonerated or, in the case of suspension, that it was wholly unjustified, the Government servant shall be given the full pay to which he would have been entitled, had he not been dismissed, removed or suspended,

(o) *Devendra v. Uttar Pradesh*, A. I. R. 1962 S. C. 1334.

as the case may be together with any allowances of which he was in receipt prior to his dismissal, removal or suspension.

(3) In other cases, the Government servant shall be given such proportion of such pay and allowances as such competent authority may prescribe.

Provided that the payment of allowances under clauses (2) and (3) shall be subject to all other conditions under which such allowances are admissible.

(4) In a case falling under clause (2) the period of absence from duty be treated as the period spent on duty for all purposes.

(5) In a case falling under clause (3) the period of absence from duty shall not be treated as period spent on duty unless such competent authority specifically directs that it shall be so treated for any specific purposes."

This rule has no application to cases like the present one in which the dismissal of a public servant is declared invalid by a civil court and he is reinstated. This rule, undoubtedly, enables the State Government to fix the pay of a public servant whose dismissal is set aside in a departmental appeal. But in this case the order of dismissal was declared invalid in a civil suit. The effect of the decree of the civil suit was that the appellant was never to be deemed to have been lawfully dismissed from service and the order of reinstatement was superfluous. The effect of the adjudication of the civil courts is to declare that the appellant had been wrongfully prevented from attending to his duties as a public servant. It would not in such a contingency be open to the authority to deprive the public servant of the remuneration which he would have earned had he been permitted to work.

It is necessary in this connection to refer the ordinary law of Master and Servant. The law is well settled that if, where there is an ordinary contractual relationship of master and servant, the master terminates the contract the servant cannot obtain an order of Certiorari. If the master rightfully ends the contract there can be no complaint: if the master wrongfully ends the contract then the servant can pursue a claim for damages (p).

The contract of service between the teacher and the managing committee of a school as in this case is not a kind of contract to which can be applied the doctrine applicable to (i) cases under Article 311 of the Constitution, or (ii) cases under the Industrial Disputes Act for reinstatement of workers in industrial establishment, or (iii) cases of services under statutory corporations and bodies. A wrongful dismissal does not mean that the court will have to reinstate the wrongfully dismissed person. In common law the ordinary remedy of an aggrieved person in such a case is damages for wrongful dismissal and not reinstatement.

If the dismissed person wants reinstatement then he has got to adopt the procedure laid down by the Statute and ask for reinstatement from the statutory body which the statute has expressly clothed with the power of reinstatement. It is not for the court to be the substitute for the appeal

(p) *Vidyoday University v. Silva*, (1964) 3 All England Reports 865. See also, *Ridge v. Baldwin* (1963) 2 All England Reports 66.

committee which alone has the power to order reinstatement in the facts of the case.

In making an order under section 21 of the Specific Relief Act or making a declaration that the plaintiff is still continuing as a teacher of the school under section 42 of the Specific Relief Act, or even granting an injunction to the plaintiff restraining the school committee from interfering with her duties as a teacher the court exercises a discretionary power in the nature of equitable relief although in India granted by the Statute, Specific Relief Act. Nevertheless the discretion is always with the court. To force a teacher on the managing committee where she is not wanted may not in the facts of the case be conducive either to the cause of education, school or even the plaintiff teacher herself. On that ground the court would be justified in not exercising that discretion to grant reinstatement even if it had the power to do so, as it has the power to grant injunction (q).

Where the agreement of service provides that the servant may be dismissed summarily for misconduct without any notice being given to him beforehand and also suggests that some investigation may be made but the nature of the investigation is not indicated, it may be an investigation by the employer to inform its own mind and may not be a judicial inquiry (r).

Courts cannot go into the merits of the findings and discuss whether the charges had been established. The decision of the appointing authority shall be taken as final (s).

Officials of District Boards are public officials and are in a sense Government servants (t). Who are Government Servants.

Municipal servants stand on the same footing as other public and Government servants (u).

An employee of the Damodar Valley Corporation could not be treated as an officer holding a civil post under the Union or the State Government, the Corporation having been created by an Act called the Damodar Valley Corporation Act, 1948, it had a distinct legal entity of its own which was separate from the entity of the Union of India or any State therein (v).

Employees of the Commissioners for the Port of Calcutta cannot be held to be civil servants even though the Commissioners for the Port had adopted the fundamental rules applicable to Government Civil Servants (w).

An Executive Officer under the Punjab Municipal (Executive Officer) Act, 1931, does not hold a civil post under the State within the meaning of Art 311 even though the Government had a hand in his appointment or

(q) *Baidyanath Bose v. Sudha Roy*, 70 C. W. N. 571. (P. B. Mukherjee J)

(r) *Bibhuti Ghosh v. D. V. Corporation*, A. I. R. 1953 Cal 581 (Bose J).

(s) A. I. R. 1957 Orissa 74.

(t) *Prabhu Lal v. District Board, Agra*, A. I. R. 1938 All 276.

(u) *L. Sankar Lal v. Balkishan*, A. I. R. 1938 All 57.

(v) *Bibhuti Bhusan v. Damodar Valley Corporation*, A. I. R. 1953 Cal. 581.

(w) *Nagendra Kumar Ray v. Commissioners for the Port of Calcutta*, A. I. R. 1955 Cal. 56.

dismissal under the provisions of that Act (x). Secretary of a Co-Operative Society does not in any sense come under the category of a servant holding civil post under the State (y).

Again, a person giving up Government service and then joining a post under the State Co-operative Bank, Patna cannot be said to hold a civil post under the State of Bihar within the meaning of Art. 311 (z).

Employees of the Sindhri Fertilisers and Chemicals Ltd. are not servants of the Union Government even though the Company was completely owned by the Union Government and the directors of the Company are appointed by the President of India (a).

A clerk in the service of District Board was not a Government servant and as such Art. 311 did not apply to him (b). That is the Patna View.

Bhargava J. of the Allahabad High Court held that the procedure prescribed under Art 311 of the Constitution of India need not be followed in the case of an employee of a Municipal Board (c). Similarly an employee of a Municipal Board could not rely upon the Fundamental Rules framed regarding the recruitment to service to a department of the State Government (d). Municipal employees in the U.P. are not entitled to any show cause notice before termination of their services (e).

Between a department of the Government and a Statutory corporation the difference is not only in form but also in substance. The necessary concomitant of the form with this difference in substance is to remove it from its character as a Government Department. Hence employment under the corporation is not employment in a Government department and therefore service under the Life Insurance Corporation of India is not service under the Government of the Union (f).

An employee of the State Bank of India is not a civil servant of the Union Government and therefore Arts. 311 & 320 of the Constitution have no application to his case (g).

Whether a particular person is a municipal servant or a Government servant is determined by the functions which he performs. If he performs the functions relating to a municipal committee, he is a municipal officer; but if he performs the functions relating to the Government, he is a Government

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- (x) *Mangal Sain v. State of Punjab*, A. I. R. 1952 Punj 58.
 (y) *Kumaran v. State of Trav-Co*, A. I. R. 1952 Trav-Co 264.
 (z) *Chaturbhuj v. Chairman, Board of Directors*, A. I. R. 1955 Pat. 223.
 (a) Per Ramaswami C. J. and Prasad J. in *Subodh Ranjan Ghosh v. Sindhri Fertilisers etc.*, A. I. R. 1957 Pat. 10.
 (b) *Rangnath Misra v. Chairman, District Board*, A. I. R. 1957 Pat. 333, per Ramaswami C. J. and Prasad J.
 (c) *Syam Lal Gupta v. The State*, 1956 A. L. J. 483.
 (d) *Badri Prasad Dubey v. State of U. P.*, A. I. R. 1957 All. 124.
 (e) *Rameshwar v. Municipal Board*, A. I. R. 1958 All. 841.
 (f) *Narayanaswamy Naidu v. Krishnamurti*, A. I. R. 1958 Mad. 343.
 (g) *Baleshwar Prasad v. State Bank of India, Gaya*, A. I. R. 1958, Patna 418 per Ramaswami C. J. and Choudhuri J. following A. I. R. 1957. Patna 10.

servant. The question whether a person is an employee of a municipal committee is not affected by the manner of his appointment for a person may be the servant of another although a third party has the power of appointing or dismissing him or has control in regard to his work or pays his wages. A person appointed by the Government under Section 4 of the East Punjab Local Authorities (Restriction of Functions) Act, to discharge the duties of the Water Works Department of a Municipal committee and designated as the Superintendent of Water Works cannot be said to be a holder of a civil post under a State within Art 311(1) of the Constitution (h).

The following extract from a judgment of the Supreme Court, throws a flood of light on the question whether a workman can be represented in an enquiry by a representative of his Union or by a Lawyer:

“The common contention urged on behalf of the appellants was that the enquiry on the results of which the orders of dismissal were based was not a proper and valid enquiry inasmuch as the workmen were not allowed to be represented at the enquiry by a representative of the Jamshedpur Union to which these workmen belonged. It has been urged that fair play demands that at such an enquiry the workman concerned should have reasonable assistance for examination and cross-examination of the witnesses and for seeing that proper records are made of the proceedings. It has been argued that a representative of the workmen’s Union is best suited to give such assistance and in the absence of such assistance the workman does not get a fair chance of making his case before the Enquiry Officer. It appears that when on June 5, 1953, requests were made on behalf of the several workmen that they should be allowed to be represented by a representative of the Jamshedpur Mazdoor Union at the enquiry to conduct the same on workmen’s behalf, the management rejected this request but informed the workmen that they could, if they so desired, be represented by a co-worker from the workmen’s own department at the enquiry. The question which arises therefore is whether this refusal of the workmen’s request to be represented at the enquiry by a representative of their Union vatiated the enquiry.”

Can a Workman be Represented by his Union Personnel at an Enquiry.

“Accustomed as we are to the practice in the courts of law to skilful handling of witnesses by lawyers specially trained in the art of examination and cross-examination of witnesses our first inclination is to think that a fair enquiry demands that the person who even if not a lawyer may be expected to examine and cross-examine witness with a fair amount of skill. We have to remember however in the first place that these are not enquiries in a court of law. It is necessary to remember also that in these enquiries, fairly simple questions of fact as to whether

Role of Lawyers at such an Enquiry.

(h) per Bhandari C. J. and Khosla J. in *State of Punjab v. Prem Parkash* A. I. R. 1957 Punjab 219 relying upon *Barnes v. District of Columbia*, 1876-23 Law. Ed. 440; *Denver v. Spencer*, 114 Am. St. Rep. 158 and page 112, Vol 22, Halsbury’s Laws of England.

certain acts of misconduct were committed by a workman or not only fall to be considered, and straight forward questioning which a person of fair intelligence and knowledge of conditions prevailing in the industry will be able to do will ordinarily help to elicit the truth. It may often happen that the accused workman will be best suited, and fully able to cross-examine the witnesses who have spoken against him and to examine witnesses in his favour."

"It is helpful to consider in this connection the fact that ordinarily in enquiries before domestic tribunals the person accused of any misconduct conducts his own case. Rules have been framed by Government as regards the procedure to be followed in enquiries against their own employees. No provision is made in these rules that the person against whom an enquiry is held may be represented by anybody else. When the general practice adopted by domestic tribunals is that the person accused conducts his own case, we are unable to accept an argument that natural justice demands that in the case of enquiries into a chargesheet of misconduct against a workman he should be represented by a member of his Union. Besides it is necessary to remember that if any enquiry is not otherwise fair, the workman concerned can challenge its validity in an industrial dispute.

Discretion of the
Employer.

is being held by the management has no right to be represented at such enquiry by a representative of his Union; though of course an employer in his discretion can and may allow his employee to avail himself of such assistance" (i).

To sum up, therefore, it is necessary to point out that reviewing a large number of decisions of different High Courts a Full Bench of the Allahabad High Court held that the true test to determine whether a person held a civil post under the Crown as contemplated by Sec. 240 of the Government of India Act, 1935 or was a member of the civil service of the Union or the State or held a civil post under the Union or the State has primarily to be determined in relation to the functions which he performed. If his duties relate to activities which fell directly within the sphere of the Union or the State and his services were under the direction and control, as also his appointment was either by the Union or the State, then he could fall under those services which are contemplated by either Sec 240 of the Government of India Act, 1935 or by Art 311 of the Constitution of India, but if the sphere of activity of the employee fell within the sphere of activity of a local authority constituted under some Statute having a separate legal existence, then the position of that employee, even though the State or the Union controlled some of his activities and gave him direction in the discharge of his functions, fell outside the scope of Sec 240 of the Government of India Act, 1935 or Art 311 of the Constitution of India (j).

A person cannot be removed by an authority subordinate to the one by

(i) *N. Kalindi v. Tata Locomotive*, 1960 (II) S. C. A. 203.

(j) *M. A. Kidwai v. Chairman, Improvement Trust*, A. I. R. 1958 All. 353 FB.

whom he was appointed. But this provision cannot be read as implying that the removal must be by the very authority who made the appointment or by his direct superior. It is enough that the removing authority is of the same rank and grade (k). Authority Competent to Remove.

A Statutory body has to act within the four corners of the Statute which has brought it into existence. When it acts in excess of its authority or disregards its statutory obligations the act is *ultra vires* and void and a declaration to that effect by the Court may have the effect of enforcing a contract of personal service. So when an employee has a statutory status and there has been a violation of the provisions of the statutes while terminating the service of such an employee the latter, by suit, gets a declaration that the order is null and void and that he continues in service (l). It is a well settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. If dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed otherwise the procedural sword must perish with the sword (m). To-day with tremendous expansion of welfare and social service functions increasing control of material and economic resources and large scale assumption of industrial and commercial activities by the State, the power of the executive Government to affect the lives of the people is steadily growing. The attainment of socio-economic justice being a conscious end of State Policy, there is a vast and inevitable increase in the frequency with which ordinary citizens come into relationship of direct encounter with State power-holders. This renders it necessary to structure and restrict the power of the executive Government so as to prevent its arbitrary application or exercise. Every action of the executive Government must be informed with reason and should be free from arbitrariness (n). Employment under Corporation.

As has been pointed out by the Supreme Court in *Agarwal v. Hindusthan Steel Ltd.* (o) an employee of a statutory corporation like the Hindusthan Steel Ltd. cannot be regarded as an employee of the Government so as to attract Article 311. "We must, therefore, hold", observed the Supreme Court, "that the corporation which is Hindusthan Steel Limited in this case is not a department of the Government nor are the servants of it holding posts under the State. It has its independent existence and.....it is distinct

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- (k) *Mahesh Prasad v. State of Uttar Pradesh*, 1955 S. C. A. 65.
 - (l) *U. P. S. W. Corporation v. C. K. Tyagi*, A. I. R. 1970 S. C. 1244; *Indian Air Lines Corporation v. Sukh Deo Rai*, 72 C. W. N. 205.
 - (m) See, *A. S. Ahluwalia v. State of Punjab*, A. I. R. 1975 S. C. 984; *Sukhdev v. Bhagatram*, A. I. R. 1975 S. C. 1331.
 - (n) *Ramana v. L. A. Authority of India*, A. I. R. 1979 S. C. 1628 per Bhagwati J.
 - (o) A. I. R. 1970 S. C. 1150.

even from its members. In these circumstances, the appellant, who was an employee of Hindusthan Steel Ltd. was not entitled to the protection of Article 311". It may be noted that the Hindusthan Steel Ltd. is a Government Company; under the Articles of Association the President of India enjoys unlimited powers of management; and all the shares are held by the Union of India. Even then an employee of Hindusthan Steel Ltd. was held to be not an employee of the Central Government.

The Durgapur Development Authority being in the nature of a body corporate like the Hindusthan Steel Ltd. its employee should not be regarded as an employee of the State Government within the meaning of Article 311 of the Constitution.

The question may be looked at from another point of view. Clause (1) of Article 311 describes the person or persons to whom the protection under Clause (2) is intended to go. Clause (1) speaks of (i) persons who are members of (a) a Civil Service of the Union, or (b) an All India Service or (c) a Civil Service of a State, or (ii) persons who hold a civil post under the Authority for paying his salary.

It, therefore, follows that an employee of the Authority does not hold any civil post under the State, and hence he is not entitled to the protection under Article 311(2).

But a person who is appointed by the Authority with the approval of the State Government, should be regarded as a person holding a civil post under the State Government, because the Authority appoints him as the agent of the State Government. He can claim the protection under Article 311(2).

A person whose services have been obtained on loan from the State Government is undoubtedly a person holding a civil post under the State Government. Most of the appointments are, however, made by the Authority and hence most of the persons serving under the Authority are the employees of the Authority and not of the State Government and as such they cannot claim the protection of Article 311(2).

So, employees of D. V. C. (p), Port Commissioner (q) Co-Operative Society (r), Sindhri Fertiliser (s), State Bank (t) are not Government servants.

It is a well settled principle that when there is a purported termination of a contract of service, a declaration, that the contract of service still subsisted, would not be made in the absence of special circumstances because of the principle that Courts do not ordinarily grant specific performance of service. This is so, even in cases where the authority appointing an employee was acting in exercise of statutory authority. The relationship between the person appointed and the employer would in such cases be contractual, i.e.,

(p) *Bibhuti v. DVC*, A. I. R. 1953 Cal. 581.

(q) *Nagendra v. Commrs*, A. I. R. 1955 Cal. 56.

(r) *Kumaran v. state of Trav. Co*, A. I. R. 1952 Trav-Co 264.

(s) *Subodh v. Sindhri*, A. I. R. 1957 Pat 10.

(t) *Baleshwar v. SBI*, A. I. R. 1958 Pat 418.

as between a master and his servant, and the termination of that relationship would not entitle the servant to a declaration that his employment had not been validly determined (*u*).

“Cases of dismissal fall into three classes” said Lord Reid in *Ridge v. Baldwin*, 1964 AC 40 at p. 65, firstly, dismissal of a servant by his master, secondly, dismissal from office held during pleasure, and thirdly, dismissal from office where there must be something against a man to warrant his dismissal. It is in the third category of cases that an employee cannot be dismissed without first letting him know what is alleged against him and hearing his defence or explanation. He added that in a case of purely master and servant relationship, the servant is not entitled to say that he was not heard by his master before his dismissal. Such a question of being heard or not can only arise where the authority employing the servant is under some statutory or other restriction as to the kind of contract which it can make with its servants or the grounds on which it can dismiss them. The question, therefore, would be whether the relationship between the Corporation and the respondent was anything else than that of master and servant, or whether the Corporation was under some statutory limitation or obligation by reason of which it could not terminate his service except by complying with such an obligation. The decision in *Vine v. National Dock Labour Board* (*v*), illustrates a case where the Court would grant a declaration of nullity. That was a case of lack of power in the Board to delegate its disciplinary function to a committee which dismissed the employee, an action which was held *ultra vires*, and therefore, a nullity. A similar consequence also follows where the appointment is to an office or status, such as the vice-chancellorship of a university as was the case in *Bool Chand v. The Chancellor, Kurukshetra University* (*w*), where this Court held that the tenure of office held by the appellant could not be terminated without informing him of the allegations made against him and without hearing him or giving him an opportunity to give an explanation. Contractual relationship.

There is, on the other hand, the case of *Vidyodaya University v. Silva* (*x*) where a teacher appointed by the University was found not to be holding such an office or status and where it was held that the University, though established under a statute, was under no statutory obligation or restriction, subject to which only it could terminate the service of the teacher. The service of the respondent was brought to an end by a resolution of the University Council set up under the statute establishing the University. The resolution was admittedly passed without hearing the teacher. Under the statute, the Council was empowered to institute professorships and every appointment was to be by an agreement in writing between the University and the professor

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- (*u*) See *A. Francis v. Municipal Councillors of Kuala Lumpur*, (1962) 3 All. ER. 633, and *Barber v. Manchester Regional Hospital Board*, (1958) 1 All. ER. 322.
 - (*v*) 1957 A. C. 488.
 - (*w*) 1 S. C. R. 434 (A. I. R. 1968 S. C. 292.)
 - (*x*) 1964-3 All. E. R. 365.

and was to be for such period and on such terms as the Council might resolve. Under section 18(e) of the Act, the Council had the power to dismiss an officer or a teacher on grounds of incapacity or conduct which in the opinion of not less than two-thirds of the members of the Council rendered him unfit to be an officer or a teacher of the University. Such a resolution with the requisite majority was passed. The Act gave no right to the teacher of being heard by the Council. The Privy Council held that the mere circumstance that the University was established by the statute and was regulated by statutory enactments contained in the Act did not mean that the contracts of employment made with teachers, though subject to section 18 (e) were other than ordinary contracts of master and servant, and therefore, the procedure of being heard invoked by the respondent was not available to him and no writ could be issued against the University (y). The fact, therefore, that the Indian Air Lines Corporation was one set up under and was regulated by Act XXVII of 1953 would not take away, without anything more, the relationship between it and its employees from the category of purely master and servant relationship. Are there then in the Act any provisions which impose upon the Corporation any statutory restriction or obligation which limits its power of terminating that relationship?

Later, the Court said as observed earlier, under sections 8(2) and 20, the appellant-Corporation has been given the power to employ its own officers and other employees to the extent it thinks necessary on terms and conditions provided by it in regulations made under section 45. The regulations contain the terms and conditions which govern the relationship between the Corporation and its employees. Though made under the power conferred by the statute, they merely embody the terms and conditions of service in the Corporation but do not constitute a statutory restriction as to the kind of contracts which the Corporation can make with its servants or the grounds on which it can terminate them. That being so, and the Corporation having undoubtedly the power to dismiss its employees, the dismissal of the respondent was within jurisdiction, and although it was wrongful in the sense of its being in breach of the terms and conditions which governed the relationship between the Corporation and the respondent it did subsist. The present case, therefore, did not fall under any of the three well recognized exceptions, and therefore, the respondent was only entitled to damages and not to the declaration that his dismissal was null and void(z). But where an L. I. C. employee was dismissed was under certain regulation made by the Corporation ignoring the paramount clause mentioned in Life Insurance Corporation Act, 1956 taking over the pre-Act company was declared as

(y) see also *Dr. S. B. Dutt v. University of Delhi*, 1959 S. C. R. 1236 at p. 1244. A. I. R. 1958 S. C. 1950 at p. 1054.

(z) *Indian Air Lines Corporation v. Sukhdeo Rai*, A.I.R. 1971 S. C. 1828 per Shelat J Sitting with 2 other judges.

H. P. State Warehousing Corporation v. Tyagi, 1970 2 S. C. R. 250;

R. S. Tewari v. District Board, Agra, 1964—3 S. C. R. 55;

Bank of Baroda v. Mehrotra, 1970—2 L. L. J 54;

Life Insurance Corporation v. N. Bhanerjee, 1971—1 C. L. J 1.

without power and therefore invalid. But applying the principle laid down in *Kruse v. Johnson* (a) that bye-laws validly made by county council has the force of law and the function of such bye-laws is to supplement the general law by which the legislature delegates its own power to make laws, the Supreme Court held that a mandamus could issue upon the State Electricity Board of Rajasthan which was set up under the Electricity Supply Act, 1948. Similarly, where the regulations framed by the Indian Air Lines Corporation under the powers given to it by the Air Lines Corporation Act, 1953 the respondent Sukhdeo Rai was not entitled to a declaration that his dismissal was null and void; he was only entitled to damages (b).

A very interesting question came up before the Supreme Court so recently as in May, 1979 in appeal, on special leave, against an order made by a Full Bench of the Rajasthan Office of Governor. High Court. The question was as to whether the office of Governor could be said to be an employment under the Government of India. The Court said: Semantically, the word 'employment' is not a word with a single fixed meaning but it has many connotations. On the one side it may bear the narrow meaning of relationship of employer and employee and on the other, it may mean in its widest connotation any engagement or any work in which one is engaged. If the former be the sense in which the word 'employment' is used in Cl (d) of Art 319, the office of the Governor would certainly not be an employment, because the Governor of a State is not an employee or servant of any one. He occupies a high constitutional office with important constitutional functions and duties. The executive power of the State is vested in him and every executive action of the Government is required to be expressed to be taken in his name. He constitutes an integral part of the legislature of the State though not in the fullest sense, and is also vested with the legislative power to promulgate Ordinance while the Houses of the Legislature are not in session. He also exercises the sovereign power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends. He is vested with the power to summon each House of the Legislature or to prorogue either House or to dissolve the legislative assembly and this power may be exercised by him from time to time. He is also entitled to address either House of the Legislature or both Houses assembled together and he may send messages to the House or Houses of Legislature with respect to a bill then pending in the Legislature or otherwise. No bill passed by the Houses of the Legislature can become law unless it is assented to by him and before assenting to the bill he may return the bill, provided it is not a money bill, to the Houses of the Legislature for reconsideration. He has also the power to reserve for consideration of the President any bill which in his opinion would, if it became

(a) 1898 Q. B. 91.

(b) *Rajasthan State Electricity Board v. Mohan Lal*, 1967 2 S. C. R. 377 and *Indian Air Lines Corporation v. Sukhdeo*, 1971 2 S. C. A. 176, A. I. R. 1971 S. C. 1828.

law, so derogate from the powers of the High Court as to endanger the position which that court is by the Constitution designed to fill. There is also one highly significant role which he has to play under the Constitution and that is of making a report where he finds that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution. It is the Governor's report which generally forms the basis for the President taking action under Art 356 of the Constitution.

Bhagwati J (delivering the judgment of the Supreme Court) continued: It will be seen from this enumeration of the constitutional powers and functions of the Governor that he is not an employee or servant in any sense of

Functions of
Governors.

the term. It is no doubt true that the Governor is appointed by the President which means in effect and substance the Government of India, but that is only a mode of appointment and it does not make the Governor an employee or servant of the Government of India. So also it is not material that the Governor holds office during the pleasure of the President. It is a constitutional provision for determination of the term of office of the Governor and it does not make the Government of India an employer of the Governor. The Governor is the head of the State and holds a high constitutional office which carries with it important constitutional functions and duties and he cannot, therefore, even by stretching the language to the breaking point, be regarded as an employee or servant of the Government of India. If therefore, the word 'employment' were construed to mean relationship of employer and employee, the office of Governor would certainly not be 'employment' within the meaning of Cl(d) of Art 319(c). The Governor is not under the control of the Government of India. He is not amenable to the directions of the Government of India, nor is he accountable to them for the manner in which he carries on his functions and duties. The Governor's office is therefore not an employment under the Government of India.

The Privy Council had said in the case *Emperor v. Shibnath Banerjee*(d), that their Lordships were unable to accept the suggestion of the Counsel for the respondent Banerjee that the Home Minister was not an officer subordinate to the Governor within the meaning of Sec 49(1) of the Government of India Act, 1935 and so far as the decision in *Emperor v. Hemendra Prasad Ghosh* (e), decides that a Minister is not such an officer

their Lordships were unable to agree with it. Position of Ministers. The Privy Council said that while a Minister may have duties to the Legislature, the provisions of Sec. 51 as to the appointment, payment and dismissal of Ministers, and Sec 59(2) and (4) of the Act of 1935, and the Business Rules made by virtue of Sec 59, place beyond doubt that the Home Minister is an officer subordinate to the

(c) *Hargovind v. Raghukul Talak*, A. I. R. 1979 S. C. 1109.

(d) A. I. R. 1945 P. C. 156

(e) A. I. R. 1939 Cal. 529 S. B.

Governor. The Bombay High Court held that "whatever be the practical and actual position, the fact remains that it is the Governor who can accept the resignation of the Ministry or Minister and it is the Governor again who can dismiss and remove the Minister from office (d)". Similar is the view of the Punjab High Court which held that under Art. 154(1) of the Constitution the Governor may act directly or through his subordinate officers. Under Art 166(3) the Governor can allocate the business of the Government to any Minister he likes and there is no doubt that a Minister is subordinate to the Governor who is the executive head of the State and this position he does not share with the Chief Minister or any other Minister (e). To the same effect is the decision of the J & K High Court where Anant Singh J observed: A Minister of a State is paid from its public exchequer, and he is paid for doing public duty and, in my opinion a Minister is a public officer within the meaning of Sec 80 as defined in Sec 2(17) of the Civil Procedure Code (f). Again Sec 21 (12)(a) of the Indian Penal Code says that a public servant denotes every person in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty by the Government. Considered by this test even a public servant may not be a regular employee receiving salary from his master. In other words a Minister or a Chief Minister will be clearly covered by the expression 'person in the pay of the Government'. Discussing all these and other cases, the Supreme Court held in *M. Karunanidhi v. Union of India*(g). that (a) a minister is appointed or dismissed by the Governor and is therefore subordinate to him, whatever be the nature and status of his constitutional functions; (b) a Chief Minister or a Minister gets salary for the public work done or the public duty performed by him; (c) the said salary is paid to the Chief Minister or the Minister from the Government funds. The Court concluded that it is thus incontrovertible, that the holder of a public office such as the Chief Minister is public servant in respect of whom the Constitution provides that he will get his salary from the Government Treasury so long as he holds his office on account of the public service that he discharges. The salary given to the Chief Minister is coterminus with his office and is not paid like other constitutional functionaries such as the President and the Speaker. These facts therefore point to one and only one conclusion that the Chief Minister is in the pay of the Government as a public servant.

Are public men public servants? This question arose before the Supreme Court in *Karunanidhi's* case referred to above. The Chief Minister Mr Karunanidhi was prosecuted under the Tamil Nadu Public Men (Criminal Misconduct) Act, 1973 passed by the Madras legislature and assented to by the President but subsequently repealed in 1977. That State Act provided for prosecution of

Position of Publicmen.

(d) *Namdeo v. H. G. Vartak*, AIR 1970 Bom 385.

(e) *Tara Singh v. Director*, AIR 1958 Punjab 302.

(f) *Bakshi Ghulam Mohd v. G. M. Sadiq*, AIR 1968 J & K 98.

(g) AIR 1979 SC 898, Fazal Ali J. delivering the judgement.

'public man' defining the expression to mean any Minister or Chief Minister, M. L. A. or M. L. C, Mayor or Deputy Mayor, Chairman or Vice-Chairman of Municipality or Panchayet, a person other than a Government servant who is or has been Chairman of any Corporation established, owned and controlled by the State Government or of any Government Company within the meaning of Sec 617 of the Companies Act, 1956 etc. The definition excludes the Government servants. So the concept of 'public man' as contemplated by the State Act, the Supreme Court observed, differs in certain respects from that of a public servant under Sec 21 of the Penal Code.

A High Court Judge is the holder of a constitutional office which has important constitutional functions and duties. He is as much a part of the State as the executive Government. Each of its three organs, executive, legislative and judiciary is independent and supreme within its allotted sphere and it is not possible to say that one is superior to the other. The High

Position of High
Court Judges.

Court, constituted of the Chief Justice and other Judges, exercises the judicial power of the State and is co-ordinate in position and status with the Governor

aided and advised by the Council of Ministers who exercises the executive power and the Legislative Assembly together with the Legislative Council, if any, which exercises the legislative power of the State. Plainly and unquestionably, therefore, a High Court Judge is not subordinate either to the executive or to the legislature. It would indeed be a constitutional heresy to so regard him. He has a constitutional function to discharge, which includes adjudication of the question whether the executive or the legislature has overstepped the limits of its power under the Constitution. No doubt Art 217 Cl (1) provides for appointment of a person to the office of a High Court Judge by the President, which means in effect and substance the Central Government, but that is only laying down a mode of appointment and it does not make the Central Government an employer of a High Court Judge. In fact a High Court Judge has no employer. He occupies a high constitutional office which is co-ordinate with the executive and the legislature (h). These observations apply equally to the office of a Judge of the Supreme Court.

The question as to whether the officers and members of the staff of the High Court could be said to be persons "serving under the Government of India or the Government of a State in a civil capacity" so as to be within the scope of Art 320(3) (c) which requires consultation with the appropriate

Public Service Commission in disciplinary matters
High Court Staff. was considered by the Supreme Court also.

Jagannadhadas J. delivering the judgment pointed out: the phrase—a person serving under the Government of India or the Government of a State... seems to have reference to such persons in respect of whom the administrative control is vested in the respective executive

(h) *Union of India v. S. H. Seth*, A.I.R. 1977, S. C. 2328 at page 2354 per Bhagwati J.

Governments functioning in the name of the President or of the Governor or of a Rajpramukh. The officers and staff of the High Court cannot be said to fall within the scope of the above phrase because in respect of them the administrative control is clearly vested in the Chief Justice (i)

The above test and the principle so laid down apply equally to the Judicial Officers serving in any State. Following the decision in *Pradyat Kumar's* case, the Supreme Court held that just as the High Court staff are not serving under Judicial Officers, the Government of the State, the Judicial Officers are also not serving under the State Government, because they are entirely under the jurisdiction of the High Court for the purpose of control and discipline(j).

"In *Kuseswar Saikia's* case(k), this Court said that further promotion of District Judges is a matter of control of the High Court. Therefore, the initial appointment of persons to be District Judges as well as the initial posting of persons to be District Judges is with the Governor. Once they are appointed the entire control is thereafter vested in the High Court. As to how further promotion of District Judges can be made is illustrated by their appointment to Selection Grade posts".

The Governor has power to pass all orders of dismissal, removal or termination on the recommendations of the High Court which are made in exercise of the power of control vested in the High Court. The High Court of course under this control cannot terminate the services or impose any punishment on District Judges by removal or reduction. The control over District Judges is that disciplinary proceedings are commenced by the High Court. If, as a result of any disciplinary proceedings, any District Judge is to be removed from service or any punishment is to be imposed that will be in accordance with the condition of service (l).

The conclusion of the majority judgement of the Punjab High Court that the order of confirmation is to be passed by the Governor in consultation with the High Court is erroneous and was set aside. Rule 10 which confers power on the Governor to confirm is *ultra vires* the Constitution. The order of confirmation of District and Sessions Judge is to be passed by the High Court. The unanimous view quashing the order passed by the Governor directing the removal because the same was based on enquiry conducted by the Director, Special Enquiry Agency, otherwise than through or with the concurrence of the High Court was upheld. The unanimous view that provisions of Rule 9 of the Punjab Civil Service (Punishment and Appeal) Rules are not complied with was also upheld (m).

Appellant, Lekhraj Khurana, was appointed by the Governor-General in July 1942, as Supervisor, Army Ordinance Corps. In September and

(i) *Pradyat Kumar Bose v. Chief Justice*, A.I.R. 1956, S. C. 285.

(j) *Baldev Ray Gulani v. Punjab and Haryana High Court*, A. I. R. 1976 S. C. 2490.

(k) *State of Assam v. Kuseswar*, A. I. R. 1970 S. C. 1616; 2 S. C. R. 923.

(l) *High Court of Punjab v. State of Haryana*, A. I. R. 1975 S. C. 613; *B. S. Yadav v. State of Haryana*, A. I. R. 1981 S. C. 561.

(m) *High Court of Punjab v. State of Haryana*, A. I. R. 1975 S. C. 613, *ibid*.

October, 1950, he was served with charge-sheets by the Ordinance officer, Shakur Basti, Delhi, where he was posted at that time, calling upon him to submit his defence to the charges of making serious false allegations against his superior officer, Major H. H. Dhillon. The appellant asked for time and demanded copies of certain documents to prove his case. While this enquiry was going on, he was served with an order, issued by the Ordinance Officer, terminating his services with immediate effect giving one month's notice of discharge. The appellant challenged the legality of the above order.

The sole material issue which was framed in the suit, which the appellant had brought, was whether the order removing the appellant from services was illegal, wrong, void, *ultra vires* and inoperative. The trial Judge held that Article 311 of the Constitution was applicable to the case of the appellant. The suit was decreed. The Union of India preferred an appeal which was decided by the Additional District Judge, Delhi, who held that Article 311 was not applicable to the appellant as he held a post connected with Defence. The appeal was allowed and the suit was dismissed. Lekhraj appealed to the High Court. It was found by the High Court that the salary of the appellant was paid out of the estimates of the Ministry of Defence and he was intimately connected with the defence of the country, not as a combatant but as a person holding a post the object of which was exclusively to serve the Military Department. In the opinion of the High Court Articles 309 and 310 were applicable to the case of the appellant, and not Article 311 (n).

On the question of whether the services of the appellant were terminated without complying with the Rules, the High Court expressed the view that the breach of such Rules did not give the aggrieved party a right to go to the Court. It relied upon the Privy Council decision in *R. Venkata Rao v. Secretary of State* (n-1), and dismissed the appeal.

The appellant thereafter came before the Supreme Court. It observed that the question whether the case of the appellant was governed by Article 311 stands concluded by two decisions of the Supreme Court (o). These are unreported cases but the Court observed that an Engineer in the Military services who was drawing his salary from the Defence estimates could not claim the protection of Article 311(2) of the Constitution.

The breach of statutory Rule in relation to the conditions of services would entitle the aggrieved party, a Government servant, to take recourse to the Court for redress (p).

In *Lekhraj's* case, the Counsel for the appellant attempted to reopen the finding on the question of malafides and also to invoke the Rule of natural

(n) *Lekh Raj v. Union of India* (1971) 1 S. C. C. 780 following

(n-1) A. I. R. 1937, P. C. 31.

(o) *Jagat Rai v. Union of India*, *S. P. Behl v. Union of India*, decided in 1967 and 1968.

(p) *Uttar Pradesh v. Ayodhya Prasad*, A. I. R. 1961 S. C. 751; *Mysore v. M. H. Bellari*, A. I. R. 1965 S. C. 868.

justice in so far as the appellant had not been afforded any opportunity of showing cause against his discharge or termination of services. . . . As regards the applicability of natural justice, it has not been shown to the Court how the general law of master and servant in the absence of any protection conferred by Article 311 of the Constitution, such a Rule can be invoked. The appeal was accordingly dismissed^(q)

Relevant to this topic are the status and conditions of *workers in industry*.

With the rapid industrialisation of the country, mills, factories and industrial establishments, large and small, were set up in different areas of the different States, some even with foreign collaboration. Naturally disputes relating to the wages and service conditions developed between the employers and employees. In order to make provisions for the investigation and settlement of industrial disputes and for certain other purposes the Industrial Disputes Act was passed by the Parliament in 1947. The Act extended to the whole of India and it came into force on the 1st day of April, 1947.

Industrial Disputes Act.

Industrial dispute under the Act means any dispute or difference between employers and employees, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person. And 'industry' would mean any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft or industrial occupation or avocation of workmen. Where any employer discharges, dismisses, retrenches or otherwise terminates the services of any individual workman, any dispute or difference between that workman and his employer connected with, or arising out of, such discharge, dismissal, retrenchment, or termination shall be deemed to be an industrial dispute also, notwithstanding that no other workman nor any Union of workmen is a party to the dispute. The Act defines a 'workman' to mean any person (including an apprentice) employed in any industry to do any skilled or unskilled manual, supervisory, technical or clerical work for hire, or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute or whose dismissal, discharge or retrenchment has led to that dispute. But a 'workman' would not include a person who is employed in the police service or is employed in a prison or employed mainly in a managerial or administrative capacity or employed in a supervisory capacity, drawing wages exceeding Rs. 500/- per month or exercises functions mainly of a managerial nature.

In order to facilitate settlement of industrial disputes and to promote

(q) *Lekhraj v. Union of India*, A. I. R. 1971 S. C. 2111 (Grover J. and four other Judges). *Supra*

industrial peace, the Act, by several of its provisions, made possible the establishment of a number of agencies, such as Works Committees, Conciliation Officers, Boards of Conciliation, Courts of Inquiry, Labour Courts, Industrial Tribunals, National Tribunals and Arbitrators. The task of the Works Committee is only to smooth away frictions that might arise between workmen and the management in day-to-day work. (r). The Conciliation Officers are to mediate in an industrial dispute and make attempts to bring about a settlement. Their functions are mainly of a persuasive character but these still are clothed with certain coercive powers of the State. But where Conciliation Officers are not validly appointed the agreements reached are not binding upon the workmen *Jhagrakhan Collieries v. G. C. Agarwal(s)*. The object of the Board of Conciliation is almost the same as that of a Conciliation Officer that is, to promote settlement of disputes with the added authority that the Board's proceedings have been declared to be judicial proceedings for certain purposes and the disputes before the Board are between definite parties who are also represented on the Board. A Court of Inquiry is constituted by the Government and it inquires into matters connected with industrial disputes as may be specified to it by the Government. Sections 7 and 7A make provision for constitution of Labour Courts and Tribunals. Dismissed workmen are entitled to the assistance of Labour Courts for enforcement of all the benefits to which they are entitled. Section 7B empowers the Central Government to constitute one or more National Industrial Tribunals for the adjudication of industrial disputes which in the opinion of the Central Government, involve questions of national importance or are of such a nature that industrial establishments situated in more than one State are likely to be interested in or affected by, such disputes. While State Government is to make reference to the Industrial Tribunals, reference to National Tribunals should, in the circumstances, be made by the Central Government alone. Section 11 of the Act lays down the procedure to be followed by Labour Courts and Tribunals. But all such Tribunals must observe rules of natural justice in the conduct of inquiry otherwise their decisions are liable to be impeached in a Court of law, *Union of India v. Verma (t)*. So far as Arbitrators are concerned no appeal would lie directly against their decision but Writ of *Certiorari* under Article 226 of the Constitution can be asked for.

Civil Servants have statutory safeguards in respect of their service under Article 311 of the Constitution of India and the nature of relationship between a Civil servant and the State or the Union rules out the concept of 'collective bargaining' and so they cannot come under the privileges and facilities of trade union activities. The Trade Union Act of 1926 provides for Registration of Trade Unions and persons engaged in a trade or business can form a trade union and have it registered but registration of a trade union does not

(r) *Northbrook Jute Co. v. Their Workmen*, A. I. R., 1960 S. C. 879,

(s) A. I. R. 1975 S. C. 171.

(t) A. I. R. 1952 S. C. 882.

confer any right on the trade union under the Act of 1926. The members of the Union, however, by registration, can avail of certain immunities in relation to strike and other similar activities. Clause (3) of Section 33 of the Industrial Disputes Act, 1947 gives a very wide protection as regards conditions of service to a workman who is a member of the executive or other office bearer of a registered trade union.

In 1946 was passed the Industrial Employment (Standing Orders) Act to put an end to the various difficulties which previously workmen had to face as conditions of service were not always put in writing and the conditions were not uniform and well-defined. Provisions have been made in this Act to define with sufficient precision the conditions of employment under them and to make the said conditions known to workmen employed by them. These are called Standing Orders or Rules relating to matters set out in the Schedule to the Act and include classification of workmen, shift working, attendance and conditions of leave and holidays, termination of employment, suspension or dismissal, means of redress etc.

In 1970 Contract labour was abolished by the Parliament passing the Contract Labour (Regulation and Abolition) Act which removed an unfortunate situation pointed out by the Supreme Court in *Vegoils (P) Ltd. v. The Workmen (u)*. The Supreme Court had observed "it is clear if the work for which contract labour is employed is incidental and closely connected with the main activity of the industry and is of a perennial and permanent nature, the abolition of contract labour would be justified. It is also open to the Industrial Tribunals to have regard to the practice obtaining in other industries in or about same area".

It may now be said that much has been done so far to give security to workmen in industrial establishments and if the machineries meant for bringing about settlement of industrial disputes are properly utilised a climate of peace will prevail in the industrial life of the country.

The other legislations in this field include the Factories Act, 1948, the Payment of Wages Act, the Minimum Wages Act, 1948 the Workmen's Compensation Act, 1923, the Employers State Insurance Act, 1948 and the Payment of Bonus Act, 1965

But shortly after coming into office the Janata Government under the Prime Ministership of Mr. Morarji Desai sought to introduce and pass in the Parliament an industrial legislation known as the Industrial Relations Bill in 1977. It was supposed to group together the three separate enactments, the Trade Unions Act, 1926 the Industrial Employment (Standing Orders) Act, 1946 and the Industrial Disputes Act, 1947. But the draft legislation that emerged in Parliament excluded hospitals and educational, scientific and research institutions for which separate legislations were sought to be enacted. What was more to the point, the Government, which had set great store by village and cottage industries and district industrial centres,

(u) A. I. R. 1972 S. C. 1942,

kept the large work force engaged in these establishments specially out of the perview of the proposed industrial relations law. Thus, perhaps to avoid adding to the burden caused to the Government by the unions in the organised sector, cottage and khadi industries were denied the rights enjoyed by workers in other sectors. Several provisions were being cited by industrial and union circles as being untenable for one reason or another. One such is the stipulation that every office bearer of a trade union shall file a statement of his assets and liabilities every year with the Registrar. In the matter of Strikes, the Bill not only authorised the Registrar with the power to supervise the conduct of a strike ballot but also gave him the discretion to declare a strike illegal on a request made by any employee or employer (*The Statesman*, Sept. 12, 1979). The Bill has been rightly described as a doubtful starter. It, however, lapsed with the dissolution of the Parliament in 1979 when a mid-term poll was announced. The new Central Government installed in 1980 has, however, under its consideration introduction of a new Industrial Relations Bill with certain changes and improvements upon the lapsed Bill.

We must remind ourselves, as rightly pointed out by Reddy J in *UPSE Board v. Hari Shakar (v)*, that the Constitution has expressed concern for the welfare of workers and has provided in Art 42 that the State shall make provision for securing just and humane conditions of work and in Art 43 that the State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure etc. These are among the Directive Principles of State Policy. The mandate of Art 37 is that while these directive principles shall not be enforceable in any Court, the principles are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

With the rise of the philosophy of Socialism, as observed by Gajendra-gadkar J. in *Akadasi Padhan v. State of Orissa(w)*, the doctrine of State ownership has been discussed by political and economic thinkers. To the socialist, nationalisation or State ownership is a matter of principle and its justification is the general notion of social welfare. To the Government Undertakings. rationalist, it is a matter of expediency dominated by considerations of economic efficiency and increased output of production. In a State-owned undertaking the Government or the Government company is the owner. If they are compelled to close down, as said by Untwalia J. in *Excel Wear v. Union of India(x)*, they, probably, may protect the labour by several other methods at their command, even, sometimes at the cost of the public exchequer. It may not be always advis-

(v) A. I. R. 1979 S. C. 65.

(w) A. I. R. 1963 S. C. 1047.

(x) A. I. R. 1979 S. C. 25.

able to do so but that is a different question. But in a private sector obviously the two matters involved in running it are not on the same footing. One part is the management of the business done by the owners or their representatives and the other is running the business for return to the owner not only for the purpose of meeting his livelihood or expenses but also for the purpose of the growth of the national economy by formation of more and more capital. The properties are the undertaking and the business assets invested therein. The owner cannot be asked to part with them or destroy them by not permitting him to close down the undertaking. In a given case for his mismanagement of the undertaking resulting in bad relationship with the labour or incurring recurring losses the undertaking may be taken over by the State. Though that will be affecting the property right of owner yet it will not be inconsistent with the object of making India a Socialist State. But not to permit the employer to close down is essentially an interference with his fundamental right to carry on the business. Accordingly Sections 25-O and 25-R introduced in the Industrial Disputes Act providing for penalty for lay off and retrenchment without previous permission and for imposition of penalty for closure under certain circumstances, were struck down by the Supreme Court as being in violation of Art 19(1)(g) of the Constitution. (*Excel, ibid*).

To give, therefore, a direct answer to the primary question posed in the opening sentence of this chapter on the question of civil services in our country I am only to invite again your attention to Art 309 of the Constitution which makes reference to persons appointed to public services and posts in connexion with the affairs of the Union or of any State and Art 310 which distinguishes the defence service from the civil service. But all persons who are members of a defence service or of a civil service of the Union or of all-India service or persons who hold any post connected with defence or any civil post under the Union are treated as persons serving the Union and every person who is a member of the civil service of a State or holds any civil post under a State is treated as a person serving a State. A post is a service or employment. A person holding a post under a State is a person serving or employed under the State. The true test for determination of the question whether a person is holding a civil post or is a member of the civil service is the existence of a relationship of master and servant between the State and the person holding a post under it and that the existence of such relationship is dependent upon the right of the State to select and appoint the holder of the post, its right to suspend and dismiss him, its right to control the manner and method of his doing the work and the payment by it of his wages and remuneration. The relationship of master and servant may be established by the presence of all or some of the factors mentioned above in conjunction with other circumstances (y). Applying these tests, the Panchayet service of

True Test for Status

(y) *Mathuradas v. S. D. Munshaw*, A.I.R. 1981 S.C. 53, relying upon *State of Assam v. Kanak Chandra*, A.I.R. 1967 S.C. 884.

a State was held to be a civil service and its Secretary is a civil servant (z). A Home Guard holds a civil post (a). Similarly, members of the police force (b) and even a special constable (c) hold civil post and so do the officers appointed by the High Court (d) and the Tahsildars appointed by the Government (e) and the extra-departmental Agents under the Postal Department (f). One should not, however, confuse a civil servant with a public servant as defined in Section 21 of the Indian Penal Code, which

Public Servants throws a wider net for a different purpose. Explanations 1 and 2 of Sec 21 of the Penal Code are quite significant as they say that persons falling under any of the descriptions mentioned in the Section are public servants, whether appointed by the Government or not and clarify that wherever the words 'public servant' occur in the Section they shall be understood of every person who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to hold that situation. A juryman, an assessor, an arbitrator or a member of the panchayet assisting a Court of Justice or a public servant is a public servant. A municipal commissioner is a public servant too. As Ratanlal comments, in this Section 21 'a line is drawn between the great mass of the community and certain classes of persons in the service and pay of the Government, or exercising various public functions, who are here included in the words public servant'.

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- (z) *ibid*
 - (a) *Sher Singh v. State of Uttar Pradesh*, A. I. R. 1955 Nag 175
 - (b) *Jaganath v. State of Uttar Pradesh*, A. I. R. 1961 S. C. 1245
 - (c) *Brojogopal v. Commr of Police*, A. I. R. 1955 Cal 556
 - (d) *Prodyot v. Chief Justice*, 1955(2) S. C. R. 1331
 - (e) *State of Uttar Pradesh v. Audh Narain*, A. I. R. 1965 S. C. 360
 - (f) *Md. Mofizuddin v. J. L. R. O.*, 1981 (1) C. L. J. 178 and the cases noted therein.

THE LOCAL GOVERNMENTS AND THE LOCAL LEGISLATIVE COUNCILS

Having dealt with the Government of India and its powers, we shall now proceed to deal with those subordinate governing bodies which are known as Local Governments. Three of then existing Local Governments were much older than the Supreme Government. The central authority did not come into existence till 1773. Before that date, the Presidencies of Bengal, Madras and Bombay, were independent of one another, each being governed by its own Governor and Council and exercising absolute authority within its own limits. As the Company's territorial interests increased and as it became increasingly involved in incessant hostility with the neighbouring powers and princes, it was felt necessary to establish a central authority. By the Regulating Act of 1773, the Governor of Bengal was appointed to be also the Governor-General and he and his council were authorized to have power of controlling the government and management of the Presidencies of Madras and Bombay "....so far and in so much that it shall not be lawful for any President and Council of Madras, Bombay...." to make war or treaties without the consent of the Governor-General except in cases of imminent necessity or of special orders from the Company's authorities in England. Also the President and Council of Madras and Bombay were directed to pay due obedience to any orders they might receive from the Governor-General and Council. Pitt's Act of 1784 which aimed at bringing the Company's government more directly under the supervision of the Cabinet, while vesting the appointment of the Governor-General and the Governors in the Court of Directors, authorised the Crown to remove them from Office. By this Act, the control of the Bengal Presidency over the other presidencies was further enlarged and declared to extend "to all such points as relate to any transactions with the country powers, or peace, or to the application of the revenues or forces of such Presidencies in time of war". The net outcome of these enactments was that in matters relating to external or foreign policy, the minor presidencies were made subordinate to the Governor-General and his Councils. But it does not appear that in matters of internal administration of the territories under them, they were, in any great measure, interfered with or controlled by, the latter. The Governors and their respective councils exercised their executive and legislative powers by the authority of the Royal Charters and Parliamentary enactments; and it was not till 1833 that they were deprived of their legislative functions and reduced to the position of mere executive media or agents for carrying out

History of Local
Legislatures and their
relation to the
Supreme Legislature.

the will of the Government of India. This brings us to the history of the Local Legislatures and their relation to the Supreme Legislature.

The Regulating Act of 1773, while investing the Governor-General and his Council with the power of exercising control and superintendence over the whole of British India, did not give them correspondingly large legislative powers. On the contrary it authorised them to make laws for a very small portion of British Indian territories viz, the Company's settlement at Fort William and factories and places subordinate to it. And even this small measure of legislative power was greatly curtailed by the provision that the laws and regulations of the Governor-General and Council were not to be valid, till they had been registered and published in the Supreme Court with its approval. This made the legislative powers of the Governor-General and Council dependent on the Supreme Court and caused much friction between the two bodies. By an amending Act passed in 1781, the Governor-General and Council were authorized to frame from time to time regulations for the provincial courts which were under their protection. The regulations were liable to be disallowed by the Crown but not by the Supreme Court at Calcutta. A large number of regulations was passed under the authority of this Act. During the time of Lord Cornwallis, a regulation provided for forming them into a Code. In 1797, Parliament recognised and confirmed the legislative authority of the Governor-General and Council, independent of the Supreme Court and directed the provincial courts to pay due obedience to the regulations passed by them. Ten years later, the Governors and Councils at Madras and Bombay were authorized to make regulations, but says Mr. Ilbert, 'subject to approval and registration by the Supreme Court and Recorder's Court' respectively.

The Charter Act of 1813 extended the legislative powers of the Councils which were authorized to impose duties and taxes, with the sanction of the Court of Directors and Board of Control, within the Presidency towns and also to make regulations for enforcing the same.

From the above, it is clear that the control and supervision of the Governor-General and Council over the Presidencies of Madras and Bombay were limited to matters relating to peace and war, the latter being

Matters of Peace and War. left to exercise their executive and legislative functions within their respective territories, independent of all control. But this independence did not last for long.

"In 1833," as Mr. Cowell points out, "the attention of Parliament was directed to three leading vices in the frame of Indian Government. This first was in the nature of the laws and regulations; the second was in the ill-defined authority and power from which the various laws and regulations emanated; and the third was the anomalous and sometimes conflicting judicatures by which the laws were administered"(a). To remedy these defects, Parliament enacted a drastic measure by which legislative power was taken away from the Presidencies of Madras and Bombay and solely and exclusively vested in

(a) Cowell's Courts and Legislative Authorities in India p. 68 (5th edn.)

the Governor-General and Council. The Governors and Councils of the minor presidencies were authorised to submit to the central authority drafts or projects of any laws and regulations which they wanted. This system was in force till 1861 when a return was made to the old system.

In the meantime, the presidencies were gradually increasing in size by new conquests and cessions from the territories of the neighbouring princes and powers. The Bengal Presidency which originally included the provinces of Bengal, Bihar and Orissa had by this time extended its boundaries far beyond its original limits. The Act of 1833 provided for its division into two separate presidencies. But the Act of 1835 suspended the provision for division and authorized the creation of a new Lieutenant-Governorship for the North West Provinces. The first Lieutenant-Governor for the North West Provinces was appointed in 1836.

Up to this time, it should be noticed that the Governor-General and Council, while exercising the supreme power of control and management of the Company's possessions in India, continued to be directly responsible for the government of Bengal. This arrangement was sought to be set aside by the Charter Act of 1853 which,

- (1) empowered the Court of Directors "to declare that the Governor-General of India shall not be the Governor of the Presidency of Fort William in Bengal, but that a separate Governor shall be appointed for such a Presidency;" and
- (2) further provided that "unless and until a separate Governor shall be constituted as aforesaid," the Court of Directors might authorize the Governor-General to appoint a Lieutenant-Governor for Bengal.

The power of appointing a Governor for Bengal was not exercised, till 1912, but a Lieutenant-Governor was appointed for Bengal in 1854. This Act further authorized the creation of a new presidency on the same lines as Madras and Bombay, and until and unless such new presidency be constituted, authorized the creation of a new Lieutenant-Governorship by the Governor-General. Under the authority of this Act, the territories of the Punjab were made into a Lieutenant-Governorship in 1859.

The Act of 1853 made provisions for the creation of new presidencies and of new Lieutenant-Governorships, if the new presidencies were not constituted. The Act of 1854 made provisions for what are known as "Chief Commissionerships." "Under the old system," says Mr. Ilbert, "the only mode of providing for the government of newly acquired territory was by annexing it to one of the three Presidencies. Under this system of annexations, Bengal had grown to unwieldy dimensions. Some provision had been made for the relief of its government by the constitution of a Lieutenant-Governorship for the North West Provinces in 1836. The Act of 1853 had provided for the constitution of a second Lieutenant-Governorship, and if necessary, of a fourth presidency. These powers were however not found sufficient and it was necessary to

provide for the administration of territories which it might not be advisable to include in any presidency or Lieutenant-Governorship”(b).

Accordingly in 1854, Parliament passed an Act authorising the Governor-General in Council, with the sanction and approbation of the Court of Directors and Board of Control, and under their control and direction, from time to time by proclamation to take under his immediate authority any part or parts of British Indian territories and provide for their administration. Under powers given by this Act, the Governor-General in Council established Chief Commissionerships for Assam, the Central Provinces, Oudh and Burma. Provinces under Chief Commissioners are technically under the immediate authority and management of the Governor-General in Council, though by the Indian General Clauses Act (Act X of 1897) Sec-3, Sub-Sec. 29, a Chief Commissionership is a Local Government. The title of Chief Commissionership was formally recognised by Parliament by an Act of 1890 (33 and 34 Vict. c. 3, Sec. 1 and 3).

The Act authorising the establishment of Chief Commissionerships also authorized the Governor-General in Council with the sanction of the Court of Directors and Board of Control to declare and limit the extent and authority of Local Governments; and also directed that “the Governor-General of India shall no longer be the Governor of the said Presidency of Fort William in Bengal.”

Thus by the middle of the last century, the distinction between the Government of India and the various Local Governments was made absolute. For a little over 150 years, the Company's possessions in different parts of India remained isolated units. Then came the Act of 1773 which made one of the units viz.-Bengal, supreme over the others. And lastly, by the Acts of 1853 and 1854, the supremacy of Bengal over the other presidencies was wholly taken away and the several Local Governments were all reduced to subordination to one supreme authority styled “The Governor-General of India in Council.”

We shall now resume our sketch of the history of the Local Legislatures. We saw that by the Act of 1833, the Local Governments were deprived of their legislative powers. By the Charter Act of 1853, they were directed each to send a member to the Supreme Legislative Council. It was thought that the presence of members from the different provinces would add to the knowledge and information of the council and render legislation more in accordance with local conditions and requirements than it would otherwise be. But although this was an improvement on the system antecedent to 1854, it was not enough. Lord Canning, in a despatch dated the 9th December 1859, expressed the opinion that by giving them (the provinces) a much larger share in it (legislation), useful local measures, may be facilitated and expedited, without leading to any interference with measures of a general character or with authority and responsibility of the Governor-General in Council.” We saw in a previous lecture that the resumption by the Crown of its Indian

(b) Ilbert Government of India p. 93 (3rd edition.)

territories by the Act of 1858 was followed by a reconstitution of the Council of the Governor-General under the Act of 1861. The same Act also brought about an expansion of the system of local legislation which existed prior to 1833. Madras and Bombay got back their old legislative powers and the Government of India was authorized to establish legislative councils in Bengal, North West Provinces and the Punjab, as well as to create new Lieutenant-Governorships with legislative councils (c). A legislative council was established in Bengal in 1863, in the North West Provinces in 1866, and in the Punjab and Burma in 1897. In 1905, Bengal was broken up into two separate provinces known as Bengal and Eastern Bengal and Assam. A legislative council was given to the latter, the former retaining its old legislative council(d).

Having followed the history of the Local Governments and Legislatures, we are now in a position to enter into a discussion of their powers. And first, a word as to the meaning of the expressions: local government and local legislature. Sec. 6, of the Indian Councils Act 1892 (e), enacts that "in this Act, the expression local legislature means:

Definition of the Expression 'Local Government.'

(1) The Governor in Council for the purpose of making laws and regulations for the respective Provinces of Fort St. George and Bombay; and

(2) the Council for the purpose of making laws and regulations of the Lieutenant-Governor of any province to which the provisions of the Indian Councils Act 1861, touching the making of laws or regulations have been or are hereafter extended or made applicable."

The above meaning was strictly applicable to the term, 'local legislature' used in the Act of 1892, but it is submitted that it was also the generally recognised meaning which the courts acted upon.

The other expression, 'local government' is defined in Indian General Clauses Act (Act X of 1897, sec. 3) as meaning "the person authorized by law to administer executive government in the part of British India in which the Act or Regulation containing the expression operates, and includes a Chief Commissioner." In common parlance, however, a local government is not only an executive but also a legislative body. Thus we often speak of the Acts of a local government and even the courts sometimes use the expression in this extended sense.

Following our method of treatment in the previous lecture, we shall first discuss the powers of the Local Legislatures. These had been given by the

(c) 24 and 25 Vict. c. 67, Secs. 29 to 43; sec. 44 and sec. 46.

(d) In 1912 there was again a readjustment. Bengal and Eastern Bengal were again amalgamated under a Governor with an enlarged council and Behar was constituted a separate province under a Lieutenant-Governor with a legislative council. Again there was partition of this province of Bengal when two Independent dominions of India and Pakistan were created by the Indian Independence Act 1947 passed by the British Parliament.

(e) 55 and 56 Vict. c. 14, an Act to amend the Indian Councils Act, 1861.

Powers of Local Legislatures.

various Indian Councils Acts of 1861 (f), which, while reconstituting the Indian Legislature, laid down provisions for the establishment of local legislatures and defined their constitution. Sec. 34 of the Act enacted that the power of making laws and regulations thereby vested in the local governments should be exercised only at meetings of the council held for the purpose of making laws and regulations at which additional members (i.e. members nominated or elected for legislative purposes only) were present.

Sec. 34 created the Local Legislature as distinguished from the Local Government. And now about its powers. Sec. 42 of the Act invested the local legislatures with the power of making laws and regulations for the peace and good government of the province under it, and for that purpose to repeal or amend any laws and regulations made, prior to the coming into operation of the Act of 1861, by any authority in India, affecting the province under it.

Wide as the powers of the local legislatures were, they had been made subject to certain restrictions:

Restrictions on the Powers of the Local Legislatures.

1. It was subject to all the restrictions which had been placed on the powers of the Supreme Legislative Council and which we have already noticed.

It was subject to certain other restrictions: it could not, except with the previous sanction of the Government of India, make regulations or take into consideration any law or regulation for the following purposes:

- (a) affecting the public debt of India or the customs, duties or any other tax or duty then in force and imposed by the authority of the Government of India for general purposes of such Government;
- (b) regulating any of the current coin, or the issue of any bills, notes or other paper currency;
- (c) regulating the conveyance of letters by the Post Office or messages by the Electric Telegraph within the Presidency;
- (d) altering in any way the Penal Code of India, as established by Act of the Governor-General in Council;
- (e) affecting the religion or religious rights and usages of any class of His Majesty's subjects in India;
- (f) affecting the discipline or maintenance of any part of His Majesty's military or naval forces;
- (g) regulating patents or copy-rights;
- (h) affecting the relations of the Government with foreign princes or states (g).

Suppose however that a local legislature passed a law touching any of

(f) 24 and 25 Vict. c. 67.

(g) 24 and 25 Vict. c. 67, sec., 43.

the above mentioned purposes. What was the effect? It had been provided that "no law or provision which shall have been made by any such Governor in Council and assented to by the Governor-General... shall be deemed invalid only by reason of its relating to any of the purposes comprised in the above list(h).

The net result of this restrictive provision amounted to this that the local legislatures should not without the previous sanction of the Government of India legislate about matters comprised in the above list; and I believe, they could be lawfully restrained by the Government of India if they attempted to do so. If however they passed any such measure and secured the assent of the Supreme Government to it, the Courts would have to give effect to it, and will not be allowed to rule it *ultra vires*, and therefore invalid.

3. Among the restrictions imposed on the powers of the Indian legislature was one which precluded it from making any laws or regulations repealing or affecting any Acts of Parliament specifically mentioned in sec. 22 of the Indian Councils Act, 1861. The natural inference is that the Supreme legislature was entitled to repeal or amend Acts of Parliament, not so mentioned. But the local legislatures were absolutely precluded by a proviso in sec. 42 of the above mentioned Act from "making any laws and regulations which shall in any way affect any of the provisions of the Act (Act of 1861) or of any other Act of Parliament in force or hereafter to be in force in such Presidency."

We noticed in a previous lecture that a law or regulation of the Indian legislature was subject to disallowance of the Crown. But till such disallowance be signified, the law was valid and binding. The assent of the Crown or any other authority was not necessary to give validity to any law or regulation of the Indian legislature. It was not so with the local legislatures. Section 40 of the Act of 1861 enacted that no law or regulation of the local legislatures shall have any validity till the Governor-General shall have assented to it and the assent shall have been signified to the local government and published by it.

Local Legislature
Dependent on the
Government of India:
Assent Essential to the
Validity of the Laws
of Local Legislature:
may be disallowed.

Subsequent legislation had extended the powers of local legislatures. By Section 42 of the Act of 1861, as has been already noticed, they obtained the power of repealing or amending any law or regulation made by any Indian authority, affecting the provinces under them, *prior to the coming into operation of the Act of 1861*. Obviously, this would not empower the local legislatures to repeal or amend any law or regulation passed by the Supreme Legislature *after* 1861. This power was given by section 5 of the Indian Councils Act of 1892 (i). The words of the section were as follows: "The

Indian Councils
Act, 1892 Sec. 5.

(h) 24 and 25 Vict. c. 67, sec. 43.

(i) 55 and 56 Vict. c. 14.

local legislature of any province in India may, from time to time, by Acts passed under and subject to the Provisions of the Indian Councils Act, 1861, and with the previous sanction of the Governor-General, but not otherwise, repeal or amend as to that province any law or regulation made either before or after the passing of this Act by any authority in India other than the local legislature: Provided that an Act or provision of an Act made by a local legislature and subsequently assented to by the Governor-General... shall not be deemed invalid by reason only of its requiring the previous sanction of the Governor-General under this section."

Under the powers given by this Act, the Legislature of Bombay passed in 1898 the Bombay Improvement Act (j). The Legislature of Bengal passed the Calcutta Improvement Act under the same powers. In a case which arose under the former Act, the powers given by the Act of 1892 (section 5) to local legislatures were considered. It was contended by the plaintiff that the use of the expression "*as to that province*" in the section enabled the local legislature to repeal or amend any law of the Indian Legislature so as to affect the *whole* of that province but not any *particular locality* in it. The Court held "that the reference to the province is merely for the purpose of defining the limits of legislative operation and in no way imposes the condition that all legislation should affect the whole of that area"(k).

There is one more important point to be noticed while tracing the history of the powers of local legislatures, viz, their power to punish European British subjects. We have seen that a local legislature could not pass any measure affecting any Act of Parliament. It would follow therefore that it could not pass any law affecting or infringing the powers of the High Courts established by the Indian High Courts Act of 1861. In *R. v. Reay* (l), the Bombay High Court ruled that it had the exclusive jurisdiction to try offences committed by

British Born
Subjects

European British subjects with the exception of offences made punishable by 53 Geo. III c. 155, sec. 105 by Justice of the Peace and that therefore the

Bombay District Police Act (VII of 1867) passed by the Government of Bombay was *ultra vires*, in so far as it conferred criminal jurisdiction on Magistrates in the mofussil over British-born subjects. This disability of the local legislatures had been partially taken away by the Indian Councils Act of 1871 (m). Sec. 1 of the Act enacts that "no law or regulation made or hereafter to be made by any Governor or Lieutenant-Governor in Council in India in the manner prescribed by the aforesaid Act (Indian Councils Act, 1861) shall be invalid only by reason that it confers on magistrates, being Justices of the Peace, the same jurisdiction over European British subjects as such Governor or Lieutenant-Governor in Council, by regulations made

(j) Act IV of 1898 (Bombay).

(k) *Hari Pandurang and another v. The Secretary of State for India in Council, etc.*, I. L. R., 27 Bom. p. 424.

(l) 7 Bom. H. C. R., (Crown Cases), p. 6.

(m) 34 and 35 Vict. c. 34.

as aforesaid, could have lawfully conferred or could lawfully confer on magistrates in the exercise of authority over natives in the like cases.”

The decision in *R. v. Reay* (n) leaves no doubt that local legislatures had no power to affect the jurisdiction of the High Court established under the Act of 1861 (o). From this it should not be inferred that any Act of the local legislature would be considered *ultra vires* merely because its effect would be to indirectly affect the jurisdiction of the High Court in respect of appeals from the courts in the mofussil which were under the protection of the local governments. Thus in *Premshunker Rughunathji v. Government of India* (p), it was held that the local legislature had the power of extending or restricting the powers of the civil courts which were its own creation, “even though the possible occasions for the exercise of the High Court’s appellate jurisdiction may thus indirectly be increased or diminished in number.” Similarly, in *Collector of Thana v. Bhaskar Mahadeb* (q), the court while admitting that “any Act of the local legislature which should propose to cut down this jurisdiction would so far be *ultra vires*, maintained that legislation on the rights and obligations of the subjects by the Bombay Government in no way infringes on the authority of the High Court, unless the powers of the latter in dealing with the law when made, was in some way affected.”

Not only were local legislatures incompetent to affect the jurisdiction of the High Courts, but of all other courts which were established by Acts of Parliament. Thus in *Aboo Sait v. Arnott* (r) and *Aboo Sait v. Dale* (s) the Madras High Court held that the enactments in sections 8 and 36 of Madras Act IV of 1865 which intended to do away with the jurisdiction of the Court of Requests established by Parliamentary Statute were inoperative.

Above we have discussed the question as to whether and how far local legislatures can curtail the jurisdiction of the High Courts. We now come to the question as to whether they could confer new jurisdiction on the High Courts, i.e., to say, jurisdiction in matters not conferred by the Acts of Parliament and the Charters. The point was raised in the case of *Poorno Chunder Roy v. Kristo Chunder Singh* (t), but not decided. It was discussed in a subsequent case which arose under the Bombay Improvement Act and which we have already noticed viz., *Hari Pandurang and another v. The Secretary of State for India, etc.*, (u). The Bombay Improvement Act, 1898, set up a special tribunal

(n) 7 Bom. H. C. R., p. 6, (Crown Cases).

(o) The Indian Legislature, as we saw in the last lecture is competent to alter the powers or jurisdiction of the High Court.

(p) 8 Bom. H. C. R. (A. C. J.) 195.

(q) I. L. R. 8 Bomb. 264.

(r) 2 Mad. H. C. Rep. 439.

(s) 2 Mad. H. C. Rep. 439.

(t) 23 W. R. 171.

(u) I. L. R. 27 Bom., 424.

for dealing with cases of land acquisition under the Land Acquisition Act 1894, for the purpose of the Bombay Improvement Act. By Sec. 48 (II) a limited right of appeal was allowed from the decisions of the Tribunal to the High Court. The question arose as to whether the local legislature was competent to give the High Court power to entertain the appeals. Jenkins C. J., after having decided that the Tribunal was not a court subordinate to the High Court but a judicial body absolutely independent of it, said, "but if the Tribunal was not a court, what room was there to give the limited right of appeal to this court that section 48 (II) of the Improvement Act proposes to provide"?

"Apart from special jurisdiction in relation to particular matters derived from the authorised legislation of the Governor-General in Council the civil jurisdiction of the High Court is (1) ordinary original, (2) extraordinary original or (3) appellate and revisional. Now this limited right of appeal under the Improvement Act does not come within either of the last two heads of jurisdiction: the appellate and revisional jurisdiction can only come into play when there has been a decision of a court a condition which *ex-hypothesi* does not exist here—while extraordinary civil jurisdiction obviously can have no application. Can it then be said that our ordinary civil jurisdiction is of any avail? I think not. The conditions are so widely different from those under which our original jurisdiction is exercised that, in my opinion they do not permit of our dealing with the case as falling within that jurisdiction.

"But if this be so, the Improvement Act cannot confer on us this jurisdiction, because the local legislature has no power to control or affect by their Acts the jurisdiction or procedure of the High Courts, as that power rests with the Imperial Parliament and with the Legislative Council of the Governor-General (v).

This decision of the Bombay High Court was taken note of by the Bengal Legislature in their Calcutta Improvement Act, 1911. That Act, like the Bombay Improvement Act, made provisions for special tribunal for dealing with cases arising out of its operations, but it did not give any right of appeal to the High Court from the decisions of the Tribunal. That has been done by an Act of the Governor-General of India in Council.

There remains another point touching the power of the local legislatures which has not been definitely settled, viz., whether the local legislature could pass any law affecting the prerogative of the Crown. Mr. Ilbert held that as the power of the Governor-General in Council to affect by legislation the

prerogative of the Crown was expressly recognised by statute and as no such powers recognised in the case of the local legislatures, it could be inferred that the latter did not possess the power. This view has been rejected by the High Court of Madras in *Bell v. Municipality of Madras* (w), where both the judges held that "subject to the restrictions imposed by secs. 42 and 43 of the

(v) Sec. 24 and 25 Vic. c. 104.

(w) I. L. R., 25 Mad. 457.

Act of 1861, a law passed by the legislature of this Presidency for its peace and good government is not invalid merely by reason only that it affects the prerogative of the Crown." The point was raised in *Hari Pandurang v. Secretary of State, etc.*, (x) but was left undecided. As there has been only one decision on the question which is a very difficult one, we do not venture to give any opinion.

The next subject of treatment is the nature and extent of the powers of local governments. These powers were mostly derived from statutes and in exercising the same, the local governments, as well as the Government of India, were required to adhere strictly to the provisions of the statute under which they professed to act. How strict the courts were in enforcing this principle may be seen from the cases we are going to cite.

In *Govardhan Singh and others v. Queen* (y), the accused were prosecuted under Sec. 76, Bengal Act II of 1882, for adding to an embankment within the "prohibited area" without having obtained the permission of the Collector as required by clause (6) of that section and fined. The High Court set aside the sentence on the ground that "no proclamation and general notice of the declaration under sec. 6 was published in the manner prescribed in sec. 60 of the Act." Here, to bring any part of the province under the "prohibited area," it was necessary to publish the general notice mentioned in sec. 6 of the Act in the manner prescribed in sec. 60. The Government had failed to do so. It was held accordingly that the accused could not be convicted under sec. 76 of the Bengal Act II of 1872.

Similarly in *The Secretary of State in Council v. Nriya Gopal Audhikary* (z), as we have seen already (a) certain acts of the officers of the local government were declared to be without legal authority because the notifications which professed to give them the requisite authority were not properly issued.

And again in *Vijaya Raghava v. Secretary of State in Council* (b), where a municipal commissioner was dismissed by the Governor in Council of Madras acting under sec. 9 of Act III of 1871 (Madras) on the ground of misconduct, the court held that the Governor in Council could not exercise his power of dismissal till the fact of misconduct or neglect is ascertained to have been committed and that the civil courts were not precluded from ascertaining whether there had been in fact any neglect or misconduct. In this case, the mere fact that the act complained of was done by the sovereign power and was not an act which could have been done by a private individual did not oust the jurisdiction of the court or render the act legal. The sovereign power claims to act under the sanction of municipal law and thus comes within the jurisdiction of the civil courts. Where, however, the

(x) I.L. R., 27 Bom. 424.

(y) I. L. R. 11 Cal. 570.

(z) I. L. R. 28 Cal. 487.

(a) p. 21 ante.

(b) I. L. R. 7 Mad. 466.

jurisdiction of the municipal courts is expressly taken away by legislation, the act complained of cannot be impunged. Nevertheless it is always competent to the court to inquire whether the act complained of is consistent with or within the powers given by the legislature or has satisfied all the formalities and conditions prior to their exercise of the powers. On this point, the well-known case of *Government v. Raj Kissen Singh* (c) is well worth our consideration. The facts of the case were as follows:

At the time of the permanent settlement the northern boundary of the pergana of Susung (situated in Mymensingh at the foot of the Garo Hills) was not defined by Government. From before that time and certainly for more than sixty years, the zamindars of the pargana had exercised certain rights in the Garo Hills and over the inhabitants. Government held a survey, and declared the northern boundary of Susung to be a line running along the foot of the Garo Hills. The zaminder brought a suit to set aside the survey. The Government relied on Regulation X of 1822. Sec. 2 of the Regulation is as follows:- "The tract of country now comprised in the thana jurisdiction of Goalpara, Dhoobrie and Kurreebari in the district of Rungpore is hereby declared separated from the said district and the operation of the rules of the police, civil and criminal justice....are suspended and shall cease to have effect therein."

Sec. 8 placed the tract separated by sec. 2 under a Commissioner, and the Governor-General in Council was declared competent to direct the separation of any tract of country occupied by the Garos from the estates of the neighbouring zamindars and to do certain other acts relating thereto, e.g., to discontinue the collection by zamindars of any cesses, etc., to make arrangements either for the remission of the same or for their collection directly by the Government making compensation to the Zamindars.

Clause 2 of Sec. 8 enacts:

"No suit shall be entertained by any civil court having jurisdiction or that may have hereafter jurisdiction within the tract of country subject to the authority of the Commissioner, on account of any act of the above description done under the authority of the Governor-General in Council."

It was argued by the defendant in the above mentioned case that no civil court was competent to adjudicate upon the case. The High Court ruled to the contrary. The case was argued more than once in the High Court. Peacock, C. J., delivered the final judgment. The main points on the question of jurisdiction are summarised below:

(1) Regulation X of 1822 gives substantive power to the Governor-General in Council in respect of the tract of country described in sec. 2 of the Regulation and "we can hardly suppose that the legislature intended by a proviso upon an enactment, limited to that tract of country, to give substantive power to the Governor-General in respect of other tracts of country."

(c) 8 W. R., 343; on app. 9 W. R. 426.

The power given here to the executive which makes its acts and operations independent of civil courts, is to be exercised within a certain tract of country defined by the Regulation, (see. 2) and therefore cannot be exercised in other tracts of the country. Accordingly, any act which is done outside the defined tract would be cognisable by the civil court. Evidently the Garo Hills lay outside the defined limits, and thus came within the jurisdiction of the civil courts.

(2) The jurisdiction of the civil courts is taken away by clause 2, sec. 8 of the Regulation only in respect of a certain class of acts specified in the section; survey-award is not one of them and therefore the civil court is entitled to consider the present case which has been brought to contest a survey-award.

On the strength of the cases cited above and others to follow, we may lay down the following rules:

1. The executive while exercising its statutory powers must go through all the formalities laid down and satisfy all the conditions precedent to the exercise of the same. Thus where the Act provides that a notice should be issued before something is done, the issuing of the notice is an imperative formality, the absence of which would vitiate everything done under the Act (*d*). The notice should be issued in time, and where the terms of the notice are prescribed there should be substantial compliance with the terms. The court, however, will not insist on a literal compliance (*e*).

Again where the executive is authorised to do an act or acts on the happening of an event, the happening of the event is a condition precedent to the performance of the act or acts. If, in the opinion of the court, the event did not in fact happen, the act or acts of the executive, as well as all claims and obligations arising therefrom will be wholly void and inoperative. Thus in the case of sales for arrears of revenue under Act XI of 1859, the Government can exercise its power of sale only when there have been arrears of Government revenue. If in the opinion of the court there have been no arrears, the sale would be void and inoperative and without any legal effect (*f*).

2. It must use its powers consistently with the Act, that is to say, its acts must not be repugnant to the purport or provisions of the Act. This is very well brought out in the case of *Empress v. Nistar Raur* (*g*), where it was held that under the provisions of the Indian Contagious Diseases Act, 1868, any woman desirous of ceasing to carry on the business of a common prostitute is absolutely entitled to have her name removed from the register and that, consequently any rule or portion of a rule purporting to have been made under the provisions of that Act, which placed any obstacle in the way of

(*d*) *The Government of Bombay v. Dodyama Basapa*. I. L. R. 9 Bom. 478.

(*e*) *Hari Pandurang v. Secretary of State in Council*, etc. I. L. R., 27 Bomb. 424.

(*f*) *Ram Govind Roy v. Syad Kushufudoza*, 15 W. R. 141, *Baijnath Sahu v. Lal Sital Prasad*, 2 B. L. R. (F. B.) 1.

(*g*) I. L. R. 6 Cal. 163.

her doing so, was *ultra vires* and void. Here one of the rules made under the Act provided that applications by women to have their names removed from the register should be submitted to the commissioner who *if satisfied on inquiry* that the applicant had really ceased to practice as a common prostitute might cause her name to be removed. The court decided that the Government had no authority to make the rule, as it was inconsistent with and repugnant to the purport of the Act, which gave an absolute right to every prostitute to have her name removed from the register.

3. It must not go outside the powers given by the Act. *Government v. Raj Kissen Singh (h)*, is a very good instance of this rule. There, as we have seen, the Government was entitled to do acts of a particular description. The survey-award did not come under that description. Held accordingly that it was outside the powers of the Government given by Regulation X of 1822 and was therefore cognizable by the civil courts. The decision in *Samaldas Bechar Desai v. The Secretary of State in Council (i)*, was given on the same principle. There the Collector under Sec. 16 of Act VII of 1867 (Bombay) had recovered the cost of the punitive post from a Talukdar. It was held that the Collector had no such power as the Talukdar was not an inhabitant of the village and the cost could only be defrayed by a local rate imposed on the inhabitants of the district in which the punitive post was established (j).

4. If any territorial limits have been prescribed within which the powers were to be exercised, the acts and operations of the executive should be scrupulously confined to those limits. This is only an application of the principle laid down above. It was invoked, as we have seen, in the case of *Government v. Raj Kissen Singh (k)*. *Queen Empress v. Mangal Tekshand (l)*, is another case on the point. There it was laid down that under Sec. 5 of the Scheduled Districts (Act XIV of 1874) the Local Government could not by extending an Act which was of necessity of restricted application, make its provisions applicable to entirely new areas.

The law laid down above applies not only to the specific acts of the executive but also to the rules and regulations which from time to time they are authorized to make under Acts of Legislature. The rules and regulations so made have the force of law, but they must be strictly *intra vires* or they will be considered inoperative. This we have seen in the case of *Empress v. Nistar Raur (m)*. There a rule of the the Bengal Government was declared *ultra vires* and not binding, because it was repugnant to the purport of the Act under which the rule was made. In *Hardwar Singh v. Kheda Ojha (n)*,

(h) 8 W. R., 323; on app. 9 W. R. 426.

(i) I. L. R. 16 Bom. 455.

(j) See also *The Sub-collector of Colaba v. Gonesh Moreshwar Mehendale* 10 Bom. H. C. Rep. 216.

(k) 8 W. R. 323; on app. 9 W. R. 426.

(l) I. L. R. 10 Bom., 274.

(m) I. L. R. 6 Cal. 163.

(n) I. L. R. 20 Cal. 870.

a rule (o) relating to the powers of a Bench of Honorary Magistrates was declared *ultra vires*, on the ground that the Local Government had no power to frame the rule in question. Sec. 16 of the then Code of Criminal Procedure gave them power to frame rules relating to the *Constitution of the Bench for conducting trials*. The rule in question purported to define the powers which the Bench could exercise. It was held therefore that the rule was clearly *ultra vires*.

Similarly in *Empress v Kola Lalang* (p) it was held that a circular order issued under the Excise Act (Bengal Act VII of 1878) which fixed the limit at six quart bottles of country spirit as allowable for retail sales was without authority inasmuch as it had fixed the limit at an amount lower than that which was allowed by the Act. The circular was *more stringent* than the Act itself and therefore inoperative (q).

After what has been said, it is almost superfluous to mention that the rules of the executive not made under an Act of Legislature have not the force of law, and, that a public servant acting in obedience to them cannot be considered as acting in execution of his duty as a public servant if his act is otherwise illegal. This was laid down in *In re The Petition of Rakhmaji* (r), where on a complaint made by a sepoy deputed by a forest settlement officer to seize some carts for the use of the latter, that the accused assaulted and prevented him from seizing his cart, a Magistrate convicted the accused under sec. 353 of the Penal Code (Act XIV of 1860) for obstructing and assaulting a public servant, it was held by the High Court that the conviction under sec. 353 was bad. It was contended for the Crown that the rules of the Local Government justified the seizure of carts and that therefore the accused in obstructing the sepoy was obstructing a public servant in execution of public duty. But the Court was of opinion that the rule of the Government had not the force of law and that the seizure of the carts under the rules was illegal(s).

A conviction based on Rule 4 (iii) (c) of the Rules framed by the Bombay Government under section 5 of the Opium Act (1 of 1878) was a rule of evidence as to the fact of possession and not a rule as to the conditions of possession as contemplated by section 5, and as such was *ultra vires* of the section, so that a conviction based on the rule was illegal (t).

The rule (1), that a notice to parties to a conciliation agreement should be served through a Subordinate Judge, framed by the Local Government

(o) Rule 8 of the rules which came into force on the 15th December, 1889 and framed under the Code of Criminal Procedure, sec. 16.

(p) I. L. R. 8 Cal. 214.

(q) See also *Empress v. Ishan Chandra De*, I. L. R. 9 Cal. 847; *Collector of Thana v. Dadabhi Bamanji*, I. L. R. 1 Bom. 352. *Sethu v. Venkabaama*, I. L. R. Mad. 112.

(r) I. L. R. 9, Bom., 558.

(s) See also. *Budho v. Keso and another* I. L. R. 21 Bom. p. 773.

(t) *Gandalal v. Emp.* 27 I. C. 1915.

under section 49 of the Dekkan Agriculturists' Relief Act XVII of 1879, and published at page 682, Part I, of the Bombay Government Gazette, was not *ultra vires* and a notice so served was held to be a good notice (u).

The Government of Bombay Resolution, dated 6th May 1911 prohibiting *Vyasawtol* processions in the District of Belgaum for all time is illegal and *ultra vires* and is not covered by section 42 or 44 of the Bombay District Police Act (IV of 1890). Section 42 limits the powers of prohibition conferred on the Magistrate both in time and place, the limitation of place being to a particular town or village or vicinity thereof. Section 44(1) deals with the prohibition of religious ceremonials, but with the maintaining of public order at religious ceremonials which are not prohibited (v).

Under section 35 and 37 of Regulation V of 1804, the Local Government has power to make rules to claims which have not merged into decrees and to extend to such claims the procedure laid down in section 322(a), (b) and (d) of the Code of Civil Procedure (w).

Rules 6 and 7 of the rules framed under section 35 of Regulation V of 1804 do not authorise the District Collector to make a reference to the District Court in respect of the interest to be allowed to a creditor unless there is a dispute as to the fact or extent of liability in regard to the principal matter of the claim, and the question of interest arises as accessory and incidental to the disposal of the main claim. Where the Governor in Council of Fort St. George empowered by Notification all Magistrates of the Second Class to try cases under the Opium Act (I of 1878), it was held that the Act gave a discretion to specially empower Second Class Magistrates with jurisdiction and that the general authorisation was *ultra vires* of the powers granted by the Act, for under the Notification "the Government have exercised powers by which they have enlarged the definition of 'Magistrate' so far as this Presidency is concerned" (x).

Under the Assam Labour and Emigration Act (V of 1901) the Government issued a Notification relaxing or dispensing with the requirements of certain section of the Act in the case of garden sirdars working under the control of Assam Labour Supply Association, and empowering the District Magistrates to cancel licence of any local agent for misconduct. This condition was held not to be *ultra vires* of the Government of Madras (y).

When an order of the Executive Government is *ultra vires*, it is a mere nullity and suit was a necessary to have it set aside (z). At present one gets the appropriate remedy by a writ under Act. 226 of the Constitution of India.

Have the rules made and orders issued by Governments a retrospective

(u) *Jotiram Maniram v. Deva Ishwarapa*, 10 Bomb. 189.

(v) *Dundappa Mallaka v. Secretary of State*, 18 Bom. L. R. 460=37 I.C. 363.

(w) *The Regulation Collector of palahasti and Karvetnagar Estates v. Ramasami Chetti*, 28. Mad. 557.

(x) *Mahomad Kasim v. Emp.* 28 I. C. 157.

(y) *A. M. Ross v. Secretary of State*, 37 Mad. 55.

(z) *Balwant Ramchandra v. Secretary of State*, 29 Bom., 480.

effect? In the case of *Dowlattram Harji v. Vitho Radhoji (a)*, the High Court declined to consider a rule made by the Government of India subsequent to the making of the document which was the subject matter in the suit, presumably because the rule could have no retrospective effect. Similarly, in *Macdonald v. Riddell (b)*, the High Court held that an order made under sec. 308 Cr. P. C. 1861, by the Local Government with retrospective effect was of no legal effect.

We shall conclude this topic by noticing a somewhat anomalous case bearing on the powers of Local Government: viz., *Queen Empress v. Ganga Ram(c)*. Here the High Court of Allahabad while admitting that the appointment of one of its judges by the Lieutenant-Governor under the sanction of the Secretary of State for India, so far as its validity depended upon the provisions of sections 7 and 16 of the Indian High Courts Act, 1861, was apparently *ultra vires*; held that the appointment must be presumed to have been legally made in the exercise of some power *unknown* to the courts vested in the Secretary of State. It is difficult to reconcile this decision with the principles that have been followed by the courts in this country as well as in England in their interpretation of the constitution and powers of statutory bodies. The power of appointment of judges had vested in the Crown and under certain conditions, in the Government of India, and the Local Government is a statutory body and its power must be exercised in accordance with the provisions of the statute or statutes which gives it the power. It is doubtful whether the decision will be followed by the other High Courts.

An Anomalous case

It is now necessary to give a short resume of the Government of India Act, 1935. The Act since repealed was enacted on 2nd August 1935 by the Parliament of the United Kingdom and Sec. 5 of the Act made provision for proclamation of a Federation of India. Though Part I of the Act came into force on 1st of April 1937 the proposed federation never came and Sec. 5 was substituted for establishment of a Dominion of India by the Indian Independence Act, 1947 and the Dominion was to be a Union comprising (a) the Governors' Provinces, (b) the Chief Commissioner's Provinces (c) the Indian States acceding to the Dominion and (d) any other areas that may with the consent of the Dominion be included in the Dominion and this Dominion was established on and from the 15th August 1947. The Executive authority of the Dominion was to be exercised on behalf of His Majesty by the Governor-General either directly or through officers subordinate to him. The Executive authority extended (a) to the matters with respect to which the Dominion legislature had power to make laws; (b) to raising in British India, naval, military and air forces on behalf of His Majesty; and (c) to the exercise of such rights, authority and jurisdiction as are exercisable by His Majesty by treaty, grant, usage, sufferance or otherwise in and in

Government of India Act 1935.

(a) I. L. R. 5 Bomb. 188.

(b) 16 W. R. (Cr. Rulings) 70.

(c) I. L. R. 16 All. 136.

relation to the tribal areas. Sec. 9 provided that there shall be a council of ministers not exceeding ten in number, to aid and advise the Governor-General in the exercise of the functions (except in so far as he is by or under this Act required to exercise his functions or any of them in his discretion), provided that nothing herein shall be construed as preventing the Governor-General from exercising his individual judgment in any case which by or under this Act he is required so to do. The question as to whether a matter was within his discretion or whether the discretion was correctly exercised could not be called in question. The bracketed portion was omitted from the statute by the India (Provisional Constitution) Order, 1947. Sec. 12 of the Act catalogued the details of the special responsibilities of the Governor General for preventing grave menace to the peace and tranquility of the Country, to safeguard financial stability and legitimate interests of the minorities and several other matters and there were provisions as to what

Special Responsibilities. were called the Instruments of Instructions and for all those the Governor-General was to function under the superintendence and control of the Secretary of State. These provisions were omitted by the aforesaid Order of 1947. There was again provision for a Federal Legislature which was subsequently designated as the Dominion Legislature and the latter too was to be construed as the Constituent Assembly set up under Sec 8 of the Indian Independence Act, 1947. Legislative procedure was laid down in Sections 30 to 40 of the Act and Sec. 41 laid down that the validity of any proceedings in the Federal Legislature shall not be questioned on the ground of any alleged irregularity of procedure.

Legislative powers of the Governor-General were provided for in Sec. 42 of the Act and Sec. 45 empowered the Governor-General to issue proclamation in case of failure of Constitutional machinery and he was to exercise the functions in his discretion throughout the Federation.

Absence of provisions analogous to this in the Constitution of India put the President to a very embarrassing and helpless position during the Constitutional crisis which occurred with the fall of the Desai ministry in 1979 as a result of the current and cross-current of defections of the members of Parliament from one party to another. This stalemate had continued for several days inspite of the fact that the President realised that "everywhere around us to-day we hear not counsels of restraint and conciliation but discordant voices are raised in a spirit of confrontation, which threaten to destroy the very foundations of our society".

Part III of the Act which related to the Governor's Provinces came into force on 1st April, 1937 under the Government of India (Commencement and Transitory Provisions) Order 1936. The executive authority of a Province was vested in a Governor who like the Governor-General was to be aided and advised by a Council of ministers; he had some special responsibilities

The Provinces. and also an Instrument of Instructions and he was to function under the superintendence, direction and

control of the Governor-General but these directions must not be inconsistent with any instrument of instructions issued to the Governor by His Majesty. All executive action of the Provincial Government shall be expressed to be taken in the name of the Governor.

The Constitution of the Provincial Legislature and the Legislative procedure were provided in Chapter III of this part and sec. 87(1) provided that the validity of the proceedings shall not be called in question on the ground of any alleged irregularity of procedure.

Sec. 88 empowered the Governor to promulgate ordinances during the recess of legislature and also to promulgate Ordinances at any time in respect of matters of his discretion or exercise of individual judgment. Sec. 93 defined the powers of the Governor to issue proclamations when he was satisfied that there was failure of Constitutional machinery i.e., the Government could not be carried on in accordance with the provisions of the Act.

Part V of the Act which came into force on 1st April 1937 related to the Legislative powers and the distribution thereof. The relevant and important Section 100 needs be quoted here.

100. *Subject-matter of Federal and Provincial laws.*—(1) Notwithstanding anything in the two next succeeding sub-sections, the Federal Legislature has, and a Provincial Legislature has not, power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule to this Act (hereinafter called the "Federal Legislative List").

(2) Notwithstanding anything in the next succeeding sub-section, the Federal Legislature, and subject to the preceding sub-section, a Provincial Legislature also, have power to make laws with respect to any of the matters enumerated in List III in the said Schedule (hereinafter called the "Concurrent Legislative List").

(3) Subject to the two preceding sub-sections the Provincial Legislature has, and the Federal Legislature has not, power to make laws for a Province or any part thereof with respect to any of the matters enumerated in List II in the said Schedule (hereinafter called the "Provincial Legislative List").

(4) The Federal Legislature has power to make laws with respect to matters enumerated in the Provincial Legislative List except for a Province or any part thereof.

Sec. 104 provided for the residual powers of legislation and it laid down that Governor-General may empower either the Federal Legislature or a Provincial Legislature to enact laws including a law imposing a tax, not mentioned in any of the lists in the 7th Schedule and the executive authority was to extend to the administration of any law so made, unless the Governor-General otherwise directs. In the discharge of his functions under this section the Governor-General was to act in his discretion. Section 107 spoke of the effect of inconsistency between Federal laws and Provincial or State laws.

Sec. 108 specified certain restrictions on Legislative powers and that section was omitted by the India (Provisional Constitution) Order, 1947.

Part VI, which also came into force on 1.4.37 deals with Administrative Relations between Federation, Provinces and States. The executive authority of every province or Federated State shall be so exercised as to secure respect for the laws of the Federal Legislature which apply in that province or State. "The Government of India Act, 1935, had solved the problem by vesting the executive power relative to the concurrent field of legislation in the provinces and not in the federation. Though Section 107 of the Act enabled the federal legislature to supersede provincial legislatures in the concurrent fields, the corresponding executive power always remained in the provinces. However, in order to make it possible for the federal executive power to be exercised in respect of certain matters in the concurrent field,

Federation and the
Provinces.

the Act, had divided that field, broadly speaking between social and economic matters and those which concerned law and order and personal rights and

status. The latter formed the larger class, and the enforcement of legislation on these subjects would, for the most part, naturally be the duty of the provincial authorities. In respect of these matters, the federal government was given no executive power nor was it given power to give directions to the provinces. The other class of concurrent subjects consisted mainly of the regulation of mines, factories, welfare of labour, industrial disputes and like matters. In respect of this class of subjects the federal government could exercise executive power if federal legislation had so provided and the consent of the Governor-General under section 126 of the Act had been obtained to the enactment of such legislation (d). Finance, Property, Contracts and Suits are dealt with in Part VII which was made effective from 1-4-37. "The question of mutual immunity from inter-governmental taxation arose to be dealt with for the first time in India at the passing of the Government of India Act 1935, which endeavoured to establish a Federal Government in India. By that Act, the Crown resumed the dominion and authority vested in the Secretary of State and others and re-distributed them between the Dominion Government and the autonomous provinces created by it." (Setalvad, *ibid*, p. 140). Section 176 of Chapter III of this Part provided that the Federation may sue or be sued by the name of the Federation of India and the Provincial Government by the name of the Province. Part VIII related to creation of a Federal Railway Authority which was, however, omitted by the India (Provisional Constitution) Order 1947, and no such Authority ever came into existence.

Part IX of the Government of India Act, 1935 related to the Judiciary. It created the Federal Court and defined its powers and jurisdiction. It provided the meaning and constitution of the High Courts. The important sections are quoted in the lecture on High Courts.

Part X related to the Services including Judicial Officers under the Crown

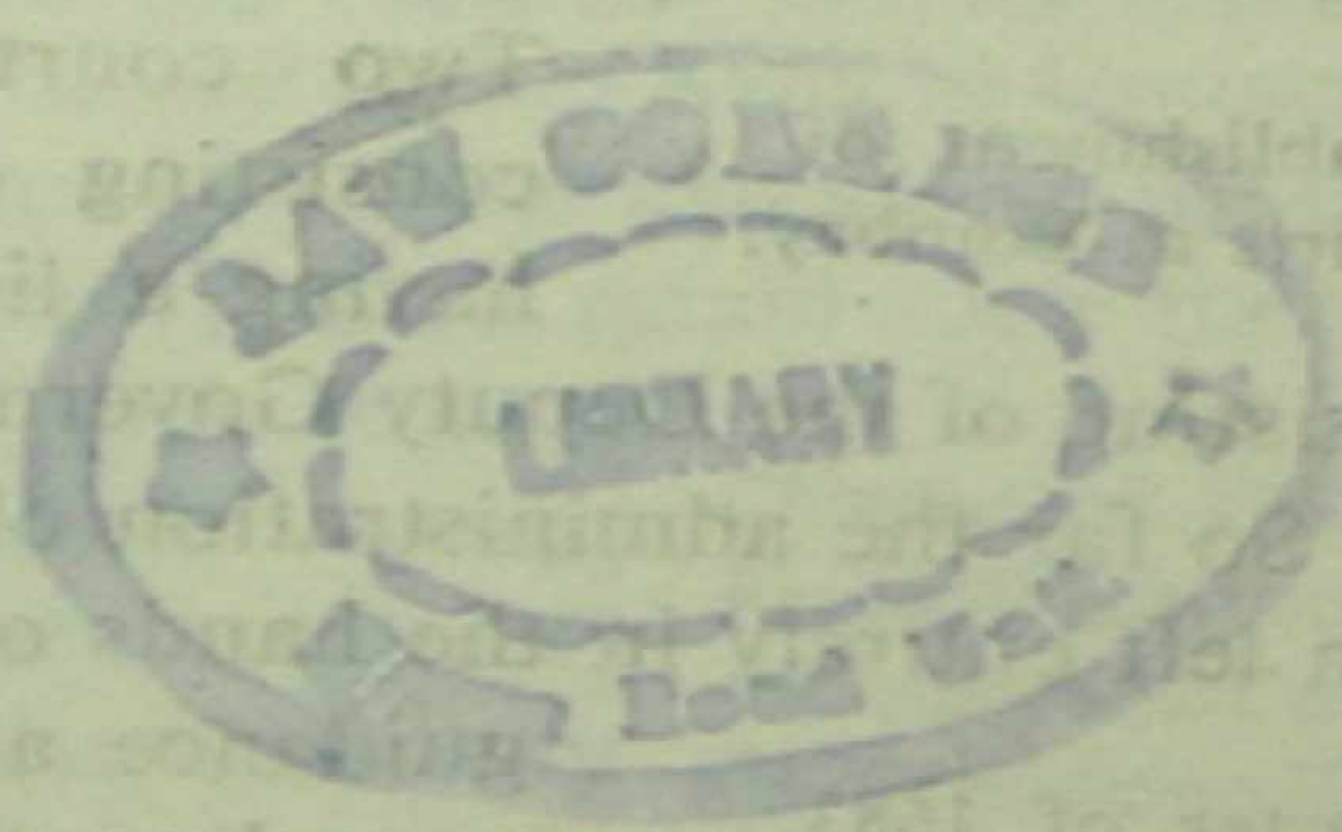
(d) Setalvad, Union and State Relations, Tagore Law Lectures, (1974) pages 81-82.

in India and it came into force on 1.4.37. Discussion in this respect will be found in the lecture on Civil Services. Provisions were made for the Constitution of Public Service Commissions and as to Chaplains and Indemnity for past acts. Elaborate provisions were also made for the Secretary of State, his Advisers and his Department in Part XI, amended by the aforesaid Order of 1947. Chapter XII of this Part dealt with the relation between the Crown and the Indian States but Sec. 311 which is the interpretation section of the Act, stated that no Indian State shall, for the purpose of any reference in the Act to Federated States, be deemed to have become a Federated State until the establishment of the Federation but this provision was omitted by the India (Provisional Constitution) Order of 1947.

The Services.

Several Schedules are appended to the statute and the 7th Schedule gives the 3 Legislative Lists. List I is the Federal Legislative list, List II is the Provincial Legislative List and List III is the Concurrent Legislative List and those lists were to operate in accordance with the provisions of Sec 100 of the Act and the residuary powers as mentioned in Sec 104 of the Statute.

Before that year even at Madras which was the most important possession of the Company at that time, there was no proper judiciary, except that two or three officers of the Company used to sit as justices in the "choultry" to dispose of petty cases. In 1681 the Governor and Council at Madras under the authority of the Charter of 1681 commenced the practice of sitting two days in the week to hear and judge all cases. In 1691 the port and island of Bombay which had been ceded to the English king in 1661 (by the Portuguese) was granted by a charter to the East India Company, which among other things authorized the Company by their governor and other officers "to do all and every other thing and things which unto the complete establishment of justice do belong, by courts, sessions, courts of judicature and manner of proceedings therein" and "to award process, hold pleas, judge and determine all actions and suits and causes whatsoever" and to execute all and every such judgment. The Commissioners who went from Surat to take possession of Bombay, on behalf of the Company, recommended the appointment of a judge-advocate. Two courts were established, the inferior court consisting of a company's officer and two Indians and the superior court consisting of the Governor and Council (a). The administration of justice in the Company's settlements had been left in the hands of the Company and their officers under the Charter. In 1683 a new departure is noticeable in the policy of the British Government. By a charter issued in that year, the king established a Court of



HIGH COURT

In this lecture, we shall treat of the High Courts and their powers. We shall begin by giving a history of the British courts in India, their origin and expansion.

In lecture III, we noticed the Charter of Charles II issued in 1661 which authorized the Governor and Council of each factory of the Company "to judge all persons belonging to

the said governor and company or that shall be under them in all causes, whether civil or criminal, according to the laws of this kingdom and to execute judgment accordingly." Very little was done

to carry out the provisions of the Charter till 1678. Before that year, even at Madras which was the most important possession of the Company at that time,

there was no proper judiciary, except that two or more officers of the Company used to sit as justices in the "choultry" to dispose of petty cases. In 1678, the Governor and Council at Madras under the authority of the Charter of 1661 commenced the practice of sitting two days in the week to hear and judge all cases.

In 1669, the port and island of Bombay which had been ceded to the English king in 1661 (by the Portuguese), was granted by a charter to the East India Company, which among other things authorized the Company by their governor and other officers "to do all and every other thing and

things, which unto the complete establishment of justice do belong, by courts, sessions, form of judicature and manner of proceedings therein" and "to award process, hold pleas, judge and determine all actions and suits and causes whatsoever... and to execute all and every such judgment." The Commissioners who went from Surat to take possession of Bombay, on behalf of the Company, recommended the appointment of a judge-advocate.

Two courts were established, the inferior court consisting of a company's officer and two Indians having a limited jurisdiction and the superior court, consisting of the Deputy Governor and Council (a).

So far the administration of justice in the Company's settlements had been left entirely in the hands of the Company and their officers under the

guidance and authority of the Charters. In 1683, a new departure is noticeable in the policy of the British Cabinet. By a charter issued in that year, the king established a Court of

(a) Shaw's Charters, Preface p. ix.

Judicature to be held at such place or places as the Company might direct, consisting of one person learned in civil law and two others to assist him. The Court was principally to be a Court of Admiralty, to judge all mercantile and maritime cases whatsoever. It was directed to judge "according to the rules of equity and good conscience and according to the laws and customs of merchants and by such methods and rules and proceedings as we shall from time to time direct and appoint." Dr. St. John was appointed to act as a judge-advocate of the court at Surat. In or about 1686 Sir John Biggs was appointed as judge-advocate in Madras. The following year the Company authorized by the Crown established by charter a municipality at Madras, consisting of a mayor, twelve aldermen and sixty or more burgesses. A Mayor's Court was also established which was to be a Court of Record with power to try civil and criminal cases. An appeal lay from this court to the already existing Court of Admiralty. The charter also directed the appointment of a Recorder to assist the mayor in the administration of justice.

A Court of Admiralty established.

Charter of 1687.
Mayor's Court
Established at Madras.

In 1726, the Court of Directors petitioned the King to the effect that there was a great want at Madras, Fort William and Bombay of a proper and competent power and authority for the more speedy and effectual administration of justice in civil causes and for the trial and punishment of capital and other criminal offences and misdemeanours. In response to the petition, the existing courts were abolished and by Charter a Mayor's Court was established at Calcutta, Madras and Bombay, consisting of the mayor and the aldermen. The court was to be a Court of Record and was authorized "to try and hear and determine all suits, actions and pleas between party and party." Appeals were allowed from the decisions of the Court to the Governor and Council. In all cases, involving sums less than 1000 pagodas, their decisions were final, but in cases involving sums exceeding that amount a further appeal lay to the King in Council. This charter empowered the Governor and five senior members of the Council to act as justices of the peace and to hold quarter sessions for the trial of all offences except high treason.

Charter of 1726,
Mayor's Courts at
Madras Bombay &
Calcutta.

In 1746, Madras fell into the hands of the French. On its restoration to the English in 1749, the Directors represented to the King in Council that it would be a great encouragement to persons to come and settle in Madras, if a proper and competent judicial authority were established there and further that the judiciaries established by the charter of 1726 had not proved wholly successful owing to certain defects in the charter. New letters patents were issued re-establishing the Mayor's Court not only at Madras but also at the other two presidency towns. Certain alterations were made in the jurisdiction of the new courts. Among others, the Mayor's Court was directed not to entertain suits between natives

Charter of 1753.
Re-establishment of
the Mayor's Court at
the Presidency Towns.

unless by consent of the parties; while the jurisdiction of the Governor and Council was limited to offences committed within the town and factories subordinate to it.

Hitherto, we have been considering the Company's courts established under the authority of the King of England. Now we shall turn for a while to the courts which claimed their authority from the princes of this country e.g., the Nawab of Bengal. In 1765, the grant of the Dewani to the East India Company was the signal for many important and far reaching changes in the judicial administration of the provinces of Bengal, Bihar and Orissa. The changes however were not effected till six or seven years later. During this period, the Company though they received the revenue and maintained the army, left the collection of the revenue as well as the administration of civil and criminal justice in the hands of the Nawab and his officers. But in 1771, the Directors resolved to stand forth as Dewan and to undertake the entire work and management of the revenues which involved the work of administering civil justice. In 1772, Warren Hastings came to Bengal as Governor and steps were immediately taken, with a view to the collection of revenues directly through the Company's servants. A committee was appointed consisting of the Governor and Council. Its report drew attention to the incompetency of the existing law courts and submitted proposals for the establishment of *Dewani* and *Foujdary Adawlut*, under the superintendence of British officers. These proposals were accepted and civil and criminal courts were established all over the Presidency.

The *Dewani* courts which were presided over by the Company's officers known as collectors, appointed principally to look after the collection of revenue and matters relating thereto took cognizance of all claims of debt, disputed accounts, contracts and demands of rent. Questions of successions to *zamindari*s and *talukdaries* were reserved for the decision of the Governor and Council.

With a view to facilitate the administration of criminal justice, a criminal court known as *Foujdari Adawlut* was established in each district. In these courts, the Kazi and Mufti sat to expound the law as well as to try offences, but the collector of the district was to attend and to see that their decisions were fair and impartial.

Besides these *Mafussil* courts, two superior courts were established at the chief seat of government, known as *Sudder Dewani Adawlut* and *Sudder Nizamut Adawlut*. The former was presided over by the Governor and Council and was a court of appeal in all civil cases involving sums over Rs. 500. The latter was the chief court of criminal appeal and was presided over by an officer appointed on behalf of the Nazim. The duty of the court was to revise and confirm in some cases e.g., death, the decisions of the *Mafussil Foujdari* courts. These courts, it should be remembered,

were established and maintained in the name of the Emperor of Delhi who still remained the lawful though nominal sovereign of the country.

The granting of the Dewani to the Company was followed by considerable agitation in England, as a consequence of which, a secret committee was appointed to enquire into the Company's affairs in this country. The committee, among other things, drew attention to the inefficiency of the then existing Mayor's Courts and upon their report was passed the Regulating Act of 1773^(b). This statute authorised the establishment by Royal Charter of a Supreme Court of Judicature at Fort William in Bengal, consisting of a Chief Justice and three other judges, being barristers of England or Ireland, of not less than five years standing who were to be appointed by the Crown^(c).

Regulating Act, 1773.

The Statute further declared that the court was to have full power and authority "to exercise and perform all civil, criminal, admiralty and ecclesiastical jurisdiction, and to form and establish such rules of practice and such rules for the process of the said court as should be found necessary for the administration of justice and due execution of all or any of the powers which should or might be granted to the court, and also should be at all times a Court of Record and should be a Court of Oyer and Terminer and Gaol Delivery in and for the town of Calcutta and the factories subordinate to it" ^(d).

Establishment of the Supreme Court in Calcutta.

In pursuance of the Statute, a Supreme Court was established at Calcutta by Royal Charter in 1774. We cannot here go into an elaborate discussion of the provisions of the charter or the statute. But we shall notice the important points concerning jurisdiction which were raised in the dispute which soon followed between the executive and the judiciary in Bengal.

The Royal Charter of 1774.

By the provisions of the Charter and in conformity with the statute, the Supreme Court was vested with full power and authority to hear and determine all complaints against any of His Majesty's subjects for crimes, misdemeanours or oppressions and also to enter, hear and determine any suit or action against any of His Majesty's subjects, in Bengal, Behar and Orissa and any suit, action, or complaint against any person in the service of the Company or any of His Majesty's subjects. It was, however, expressly provided (1) that the court should not hear or determine any indictment or information against the Governor or any member of the council for any offence, not being a felony or treason; (2) that the court should not hear and determine any suits and actions of any of His Majesty's subjects against any Indian, residing in Bengal, Behar and Orissa, except where upon a contract in writing such Indian should have agreed that in case of dispute the matter should be determined in the Supreme Court and where the cause of action should have exceeded Rs. 500.

(b) 13 George iii, c. 63.

(c) See Section 13 Ibid.

(d) Sec. 13 Ibid.

As in the case of the Mayor's or Recorder's court, an appeal was allowed to the King in Council from the decisions of the Supreme Court, under certain conditions, both in civil and criminal cases; but in the latter the conditions were much more stringent than in the former.

Even a cursory perusal of the Statute and the Charter would convince one that the powers given by them, wide and extensive as they were, were not clearly defined. In the first place, as Mr. Ilbert points out, it is not made clear as to what law the court was to administer. "Apparently it was the unregenerate English law, insular, technical, formless, tempered in its application to English circumstances by the quibbles of judges and the obstinacy of juries, capable of being an instrument of the most monstrous injustice when administered in an atmosphere different from that in which it had grown up" (e).

In the second place, what was the jurisdiction of the court? It was declared to extend over the whole of Bengal Presidency *in respect of His Majesty's subject and their employees*. But no attempt was made in the charter to define as to who were His Majesty's subjects or who were their employees. The judges were apparently under the impression that the sovereignty of the King of England had taken the place of that of the Emperor of Delhi in the provinces of Bengal, Bihar and Orissa; and accordingly they exercised their authority all over the country by issuing writs on all persons whether, strictly speaking, they were the subjects of the English King or their employees or not. Thus, in the *Cossijurah* case the court issued a writ

The *Cossijurah* case. against a Raja who was instructed by the Governor and Council not to obey it. The Sheriff and his officers were driven off by the Company's sepoys. Thereupon the court took proceedings against the officers of the Company. Their attorney was thrown into prison and the Governor-General and his councillors were served with summons to appear.

The court also assumed the right to try actions against the judicial officers of the Company for acts done in their judicial capacity. It did not recognize the Company's court as having any authority. The Emperor of Delhi was a phantom and his courts were no better. Thus in the well-known *Patna* case the Supreme Court gave judgment against officers of the Patna provincial court and had the defendants cast into prison.

These conflicts between the executive and the judiciary led to a serious dislocation of the administrative machinery of the country, and Parliament had to intervene. In 1781, an Amending Act (f), was passed which, with a view to secure the prestige and efficiency of the executive as well as to ensure justice to the native population according to their own laws and customs, made the following changes in the powers of the court.

(e) Ilbert's Government of India, p. 56.

(f) 21 George III, C. 70.

First:—The Act declared that the Governor-General and his councillors were not to be subject, jointly or severally, to the jurisdiction of the Supreme Court for any act or order or any other matter or thing whatsoever counselled, ordered or done by them in their official capacity only.—Sec. 1 (g).

Secondly:—Persons impleaded in any action or process, civil or criminal, for any act or acts done by the order of the Governor-General and Council in writing, could give the order in evidence, which order with proof that the act or acts done had been done according to the purport of the same, should amount to a justification of the said act or acts, and the defendant should be fully justified, acquitted and discharged from all and every suit, action and process whatsoever, civil or criminal, in the Supreme Court:—Sec. 2.

Provided always, that with respect to such order or orders of the Governor-General and Council as should extend to a British subject, the Supreme Court should have and retain as full and competent jurisdiction as if the Act of 1781 had not been passed.—Sec. 3.

Thirdly:—The Supreme Court was directed not to exercise any jurisdiction in any matter concerning the revenue or concerning any act or acts ordered or done in its collection, according to the usage and practice of the country or the regulations of the Governor-General and Council. Sec. 8 (h).

Fourthly:—It was declared that no person should be subject to the jurisdiction of the Court merely by reason of his being landowner, landholder or farmer of land or rent or by reason of his being employed by the Company or by a native of Great Britain in any matter of dealing or contract between party and party except in acts for wrongs and trespasses.

Fifthly:—It was provided that the Court should have jurisdiction in actions and suits against the inhabitants of Calcutta but that it should judge them according to their native laws and customs in all matters relating to inheritance and succession to lands, rents and goods and of contract and dealing between party and party. Sec. 17.

The various limitations imposed on the powers of the Supreme Court achieved two things—(1) they placed the executive above the judiciary: (2) they gave an assurance to the native population that they would not be harassed by the processes of the court, and that when within its jurisdiction, they would be, in most cases, judged according to their own laws and usages. The Statute also recognized the appellate functions of the *Sudder Dewany Adawlut* instituted by Warren Hastings for hearing appeals from the Moffusil courts; made it a Court of Record; allowed appeals to the King's Council from its decisions in civil causes which exceeded £5,000; and invested it with full authority to hear and determine all offences and abuses committed in the collection of revenues.

All these remind one of *Keshav Singh's*, case (i) which, though in a different context, is a high water-mark of legislative-Judiciary conflict. That

(g) See Morley's Digest Sec. 106.

(h) See Morley's Digest Sec. 101.

(i) A. I. R. 1965 S. C. 745,

was on a privilege matter. Keshav Singh published a pamphlet against a member of the *Uttar Pradesh* Legislative Assembly. The House found him guilty and when he was being reprimanded he behaved in an objectional manner and the House directed him to be imprisoned for contempt. He was detained. His advocate moved a *habeas corpus* petition before the Allahabad High Court alleging that the detention was illegal. The High Court granted interim bail. Instead of releasing Keshav Singh, the House held that Keshav and his Advocate and the two Judges of the High Court who passed the order for bail had all committed contempt of the House and passed a resolution to that effect and directed that the Advocate and the two Judges be brought before it in custody. The Judges moved the High Court for stay and challenged the Resolution as unconstitutional and without jurisdiction. A Bench of 28 Judges of the Allahabad High Court stayed operation of the Resolution. The House withdrew the warrant of arrest against the two Judges but directed them to appear before the House and explain their conduct. The High Court again stayed implementation of this second resolution. At this stage the President of India referred the conflict to the Supreme Court for advisory opinion under Act 143 of the Constitution of India. The Supreme Court held that the two Judges had not committed contempt of the House and the Legislature had no jurisdiction to discuss the conduct of a High Court Judge.

Conflict between Legislative and the Judiciary

The Supreme Court (old) as amended by the Act of 1781 existed for 80 years when it was abolished and replaced by the present High Court. During this period, statutes were passed from time to time altering its jurisdiction and constitution.

By sec. 29 of 26 Geo. III C. 57, the Court was authorized to take cognizance of offences committed by British subjects outside India. All servants of the East India Company and all His Majesty's subjects resident in India were by this section made subject to the Courts of Oyer and Terminer and Gaol Delivery for all criminal offences committed in any part of Asia, Africa and America beyond the Cape of Good Hope to the Straits of Magellan within the limits of the Company's trade (j).

Jurisdiction of the Court Extended 26 Geo. III c. Sec. 29. 1786.

Again, doubts having arisen as to the extent of the admiralty jurisdiction of the Court, it was enacted by Sec. 156 of 33 of Geo. III C. 152 that the Court should have powers and authority to try all offences committed on the high seas according to the laws and customs of the admiralty of England and by means of properly constituted juries.

Admiralty Jurisdiction Declared and Confirmed.

We have seen that the statute establishing the Supreme Court limited its jurisdiction to the provinces of Bengal, Bihar and Orissa. In 1775, Benares was ceded to the Company and to provide for its judicial administration, it was

39 and 40 Geo. III C. 79. Sec. 20, 1800.

(j) This section has been repealed,

enacted by 39 and 40 Geo. III C. 79. S. 20 that the authority of the Supreme Court should extend to the province or district of Benares and "over all the factories, districts and places which now are or hereafter shall be made subordinate thereto and to and over all such provinces and districts as may at any time hereafter be annexed and made subject to the said Presidency of Fort William aforesaid."

By sec. 1 of 37 Geo. III C. 142, the number of judges of the Supreme Court was reduced to three.

Number of judges reduced: 37 Geo. III C. 142 Sec. 1.

It now remains to trace the history of the Courts in Madras and Bombay. We saw that by Letters Patents issued in 1753, Mayor's courts were established in the Madras and Bombay as well as in Calcutta. That in Calcutta was replaced by the Supreme Court in 1774. Those in Madras and Bombay existed till 1797 when they were by statute abolished and replaced by Recorder's courts. These courts composed of the Mayor, three aldermen and a Recorder were given power to exercise jurisdiction in matters, civil, criminal admiralty and ecclesiastical. They were also authorized to frame rules of practice and to act as Courts of Oyer and Terminer and Gaol Delivery for Fort St. George and Bombay. As in the case of the Supreme Court at Calcutta, their jurisdiction extended to British subjects residing in the Presidencies of Madras and Bombay, and besides, to those residing in the territories of native princes who were in alliance with the Company.

Recorder's Court Established at Madras and Bombay under statute, 1779.

The Government of India Act, 1800, abolished the Recorder's Court at Madras and authorized the Crown to establish by Charter a Supreme Court in its place. The court was placed on the same footing as the court at Calcutta, invested with the same powers and subject to the same restrictions. The charter creating the court was issued next year, in 1801.

Supreme Court established at Madras in 1801 and at Bombay in 1823.

The Recorder's Court at Bombay continued to exist till 1823 when the Crown was empowered by statute to establish a third Supreme Court at Bombay on the same lines as its predecessors.

Thus in the course of 150 years since the grant of the charter of Charles II dated 1661, which for the first time gave the Company definite judicial powers, three Supreme Courts of Judicature came to be established in British India under the direct control of the King and independent of the Company. They continued to exist till 1861 without undergoing any great changes, when they were abolished by the Indian High Courts Act and superseded by the existing High Courts.

The resumption by the Crown of its territorial possession in India in 1858 was followed by a reconstitution of the law courts. By the Indian High Courts Act, 1861(k), the Supreme Courts and the *Sudder Dewani* and the

The Indian High Courts Act, 1861.

(k) 24 and 25 Vict. C. 104.

Foujdary Courts in the three Presidency towns were abolished. The High Courts which superseded them were vested with their combined powers.

Section 1 of the Indian High Courts Act authorized the establishment of High Courts in Bengal, Madras and Bombay by Letters Patents. In pursuance of this section, the Crown established by Charter High Courts at the three Presidency towns in 1862. The charters of that year were withdrawn in favour new ones issued in 1865.

Sec. 9 of the Act enacted that "each of the High Courts to be established under this Act shall, have and exercise all such civil, criminal, admiralty and vice-admiralty, testamentary, intestate, and matrimonial jurisdictions original and appellate, and all such powers and authority for and in relation to the administration of justice in the Presidency for which it is established, as Her Majesty may by such Letters Patents as aforesaid grant and direct, subject, however, to such directions and limitations as to the exercise of original civil and criminal jurisdiction beyond the limits of the Presidency towns as may be prescribed thereby;

"And save as by such Letters Patents may be otherwise directed and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council, the High Court to be established in each Presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the courts in the same Presidency abolished under this Act at the time of abolition of such last mentioned courts."

Under the authority of this statute and the charters issued under it, the High Courts have come to exercise the powers of the Supreme Courts as well as those of the *Sudder Dewani* and *Foujdari Adawlut*s which were abolished by the Act. Thus they have an original and an appellate side. On their ordinary original side the authority of the High Courts extends to the Presidency towns, but on their appellate side their authority extends over the whole province for which they are respectively established. They are not only entitled to entertain appeals from the subordinate courts, but also to exercise superintendence over them with a general power to issue rules to regulate their practice and proceedings subject, however, to the sanction of the Governor-General in Council. This was not so during the days of the Supreme Courts when there was a complete separation between the Presidency and the *Moffusil* courts. Now, however, as already indicated, the former have obtained extensive powers over the latter.

They can call for local returns; direct the transfer of any suit or appeal from any *Moffusil* court to any other court of equal or superior jurisdiction. And lastly, they have power to make and issue general rules for regulating their practice and proceedings and for keeping all books and entries and to settle tables of fees to be allowed to the sheriff, attorneys, clerks and officers of courts,

The Act of 1861 in addition to the High Courts in Calcutta, Madras and Bombay, authorized the establishment of a High Court in Allahabad which was effected in 1865 under charter from the Crown.

High Court at Allahabad, 1865.
Sec. 16.

“Our courts of law, especially the High Courts, have various powers delegated to them by the legislature, beside the power to adjudicate between litigants. For instance, under certain legislative enactments, the High Courts are given the power to frame rules, settle tables of fees and so forth. In exercising these powers, the High Courts do not act in their judicial capacity and if they frame a rule which they are not empowered to frame, the rule will be made *ultra vires*.” Thus in the case of *Jagatkishore Acharya Choudhury v. Dinanath Choudhury* (l), the question was raised whether Art. 3, Part II of the Rules made under Sec. 20 of the Court Fees Act was *ultra vires*. Art. 3, Part II fixes the rate of remuneration for commission and adds in a note that all fees due to the commissioner must be paid before the latter’s report or other returns be given in evidence. In the present case, the whole amount due to the commissioner was not paid, and the subordinate judge relying on the rule above mentioned, refused to take the commissioner’s report as evidence. On reference to the High Court, it was held, “we are also of opinion that Art 3 of the Rules is itself *ultra vires*. A commission is not in our opinion a process within the meaning of sec. 20 of the Court Fees Act. Process has a well understood meaning within which such a commission can not be included. The note also is *ultra vires*. It is inconsistent with sec. 373 of the Civil Procedure Code which says that the report of the commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the records (m).

Power of the Courts to make rules.

Here, the High Court was authorized to fix the remuneration for work done under *process*. It however went on to fix the remuneration for work done under *commission*. This is clearly *ultra vires*. Further, the High Courts note that the commissioner’s report should not be read till all fees due had been paid is inconsistent with the existing law which directs that they should be read and form part of the records, and is therefore *ultra vires*.

Similarly in the matter of *Desputty Singh. v. Doolar Ray* (n), it was held that the rule of a subordinate court prescribing certain hours for the receipt of petitions and hearing of motions could not operate to alter the period of limitation prescribed by law. Here the munsiff refused to receive a plaint which was tendered by the petitioner on the ground that it was not presented during the hours set apart for receiving of plaints. The consequence was that the petitioner’s claim was barred by limitation. Every court has power to frame rules for the proper carrying on of its business and can, accordingly set apart certain hours for certain kinds of work, but they would be *ultra*

(l) I. L. R. 17 Cal. 281.

(m) See also *In re Flemming Spinning and Weaving Company Limited*. I. L. R. 3 Bom. 439; *Ranjam Chetti v. Seshayya* I. L. R. 18 Mad. 236.

(n) I. L. R. 1 C. L. R. 291.

vires if they attempted to interfere with the operation of any existing law or laws.

Each High Court was to consist of a Chief Justice and as many judges not exceeding fifteen, as His Majesty may think fit to appoint. The Letter Patent for each of the High Courts fixed the *number* of judges. The question has been raised whether if the number of judges at any time fall below the number fixed, the court should cease to exist and be incompetent to carry out its functions. It was been decided in *Lal Singh and others v. Ghansam Singh (o)*, that no omission to fill up a vacancy under Sec. 7 of the Indian High Courts Act amongst the puisne judges could operate to suspend the jurisdiction and functions of the Chief Justice and subsisting judges of the court. It was pointed out however in the above case that the Chief Justice was essential to the existence of the court.

By Sec. 3 of the Indian High Courts' Act, 1865, the Government of India had been authorized to transfer by order, from time to time any territory or place from the jurisdiction of one to the jurisdiction of any other of the High Courts, and to empower any High Court to exercise all or any portion of its jurisdiction and powers in any part of British India not included within the limits of the place or Presidency for which it was established; and also to exercise any such jurisdiction in respect of Christian subjects of His Majesty residing in any of the native states in alliance with His Majesty.

By Sec. 2 of the Indian High Courts' Act, the maximum number of judges, beside the Chief Justice, was fifteen. The Indian High Courts Act, 1911, raised the number to twenty. It also empowered the Governor-General in Council to establish High Courts and to appoint *ad hoc* judges additional for a period not exceeding two years and during this period such temporary judges shall have all the powers of a judge of the High Court appointed by His Majesty.

Besides the Chartered High Courts established at Calcutta, Madras, Bombay and Allahabad, there were several unchartered High Courts, established by Acts of the Governor-General in Council. These were the Chief Courts at Lahore and Rangoon and the Courts of the Judicial Commissioners in the Central Provinces, Upper Burma, Oudh, Berar and Sind. They exercised appellate jurisdiction and supervision over the courts subordinate to them in the same manner as the Chartered High Courts and their decisions were subject to appeal to the Privy Council in the same manner as those of the High Courts.

Part IX of the Government of India Act, 1919 made further provisions

for constitution of High Courts to be established in British India. Each High Court was to consist of a Chief Justice and as many other Judges as the King in England might think fit to appoint. But the Governor-General in Council was also empowered to appoint additional Judges of any High Court for a specific period not exceeding two years. Section 101 of the Act laid down qualifications for a person to be appointed a Judge of the High Court. Section 102 to 105 related to the tenure, precedence and salaries of High Court Judges as also the provisions as to how vacancy in the office of the Chief Justice or other Judges was to be filled up. Section 106 spoke of the jurisdiction of High Courts. These Courts were to be Courts of record and to have original and appellate including admiralty jurisdictions irrespective of offences committed on the High Seas. The Letters Patent establishing or vesting jurisdiction, powers and authority in a High Court were provided to be amended from time to time by His Majesty by further Letters Patent. It was specifically laid down that the High Courts would not have and may not exercise any rightful jurisdiction in any matter concerning revenue or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or for the law for the time being in force. Section 109 empowered the Governor-General in Council to alter local limits of jurisdiction of High Courts and Section 110 laid down the immunity of the Governor-General, each Governor and members of the Executive Council and Minister appointed under the Act from being subjected to the rightful jurisdiction of any High Court by reason of anything counselled, ordered or done by any of them in his public capacity only. Section 111 made the immunity more specific by laying down that the order in writing of the Governor-General in Council for any act shall, in any proceeding, civil or criminal, in any High Court acting in the exercise of its original jurisdiction to be a full justification of the Act except so far as the order extends to any European British subject. In matters of inheritance and succession the Government of India Act, 1919 provided in Section 112 that the High Courts at Calcutta, Madras and Bombay, when both parties were subject to the same personal law or custom having the force of law shall decide according to that personal law or custom which governed both the parties and when the parties were subject to different personal laws or custom having the force of law the Courts shall decide according to the law or custom to which the defendant was subject.

Government of India
Act, 1919

The Government of India Act, 1935 also dealt with the subject of the judicature in part IX of the Statute. This part contains two Chapters, one relating to the Federal Court and the other to the High Courts in British India. The Federal Court is an entirely new feature and so this topic will be discussed after the provisions relating to the High Courts are mentioned in this lecture. Section 219 to 231 make provisions relating to the High Courts. As in the 1919 Act the High Courts under the 1935 Act were also to be courts of record and would consist of a Chief Justice and such other Judges as His Majesty

Government of India
Act, 1935

may from time to time deem it necessary to appoint and powers are given to the Governor-General to appoint additional Judges. It was for the first time introduced in the 1935 Act that every person appointed to be a Judge of High Court shall before he enters upon his office make and subscribe before the Governor or some persons appointed by him an oath according to the form set out in that behalf in the fourth schedule of the Act and it was further provided that every Judge of a High Court shall be appointed by His Majesty by Warrant under the Royal Sign Manual and shall hold office until he attains the age of 60 years and the Judge could be removed from his office by His Majesty on the ground of his misbehaviour or of infirmity of mind and body if the Judicial Committee of the Privy Council, on reference being made to them by His Majesty, report that the Judge ought on such ground to be removed. This provision relating to the removal of High Court Judges was undoubtedly a great improvement and gave better security to the Office of the High Court Judge than what was provided in the Government of India Act, 1919 which laid down that every Judge of a High Court shall hold office during His Majesty's *pleasure*. Therefore tenure of a High Court Judge under the 1919 Act was based purely on the pleasure theory. With regard to the jurisdiction of the High Courts the powers and jurisdiction which prevailed on the date of the commencement of the 1935 Act were maintained. But Section 226 of the 1935 Act specifically laid down that unless otherwise provided by an Act of appropriate Legislature no High Court shall have original jurisdiction in revenue matters or collection of revenue. Section 230 further made extra provincial jurisdiction of High Courts. Some of the relevant sections are quoted below:

Sec. 220 Government
of India Act, 1935.
(25 & 26 GEO. 5.)

220. (1) Every High Court shall be a court of record and shall consist of a chief justice and such other judges as His Majesty may from time to time deem it necessary to appoint.

Provided that the judges so appointed together with any additional judges appointed by the Governor-General in accordance with the following provisions of this chapter shall at no time exceed in number such maximum number as His Majesty in Council may fix in relation to this Court.

(2) Every judge of a High Court shall be appointed by His Majesty by warrant under the Royal Sign Manual and shall hold office until he attains the age of sixty years.

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223. Subject to the provisions of this Part of this Act, to the provisions of any Order in Council made under this or any other Act and to the provisions of any Act of the appropriate Legislature enacted by virtue of powers conferred or the Legislature by this Act, the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the judges thereof in relation to the administration of justice in the court, including any power to make rules of court and to regulate the sittings of the

Power to make
Rules.

court and of members thereof sitting alone or in division courts, shall be the same as immediately before the commencement of Part III of this Act.

224. (1) Every High Court shall have superintendence over all courts in India for the time being subject to its appellate jurisdiction, and may do any of the following things, that is to say,—

- (a) call for returns;
- (b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts: Superintendence.
- (c) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts; and
- (d) settle tables of fees to be allowed to the sheriff, attorneys, and all clerks and officers of courts:

Provided that such rules, forms and tables shall not be inconsistent with the provision of any law for the time being in force, and shall require the previous approval of the Governor.

(2) Nothing in this section shall be construed as given to a High Court any jurisdiction to question any judgment of any inferior court which is not otherwise subject to appeal or revision.

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226. (1) Until otherwise provided by Act of the appropriate Legislature, no High Court shall have any original jurisdiction Usage and Practice. in any matter concerning the revenue or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force.

(2) A Bill or amendment for making such provision as aforesaid shall not be introduced into or moved in a Chamber of the Federal or a Provincial Legislature without the previous sanction of the Governor-General in his discretion.

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230. (1) His Majesty in Council may, if satisfied that an agreement in that behalf has been made between the Governments concerned, extend the jurisdiction of a High Court in any Province to any area in British India not forming part of that Province, and the High Court shall thereupon have the same jurisdiction in relation to that area as it has in relation to any other area in relation to which it exercises jurisdiction.

(2) Nothing in this section affects the provisions of any law or Letters Patent in force immediately before the commencement of Part III of this Act empowering any High Court to exercise jurisdiction in relation to more than one Province or in relation to a province and an area Extent of Jurisdiction. not forming part of any province.

(3) Where a High Court exercises jurisdiction in relation to any area or areas outside the Province in which it has its principal seat, nothing in this Act shall be construed.

- (a) as empowering the Legislature of the Province in which the Court has its principal seat to increase, restrict or abolish that jurisdiction: or
- (b) as preventing the Legislature having power to make laws in that behalf for any such area from passing such laws with respect to the jurisdiction of the court in relation to that area as it would be competent to pass if the principal seat of the court were in that area.

As already mentioned Chapter I of Part IX of the 1935 Act related to the establishment and powers of the Federal Court. Section 200 provided for establishment and Constitution of Federal Court. It was a Court to be

Federal Court of
India.

established for the Federation of India and it would consist of a Chief Justice of India and such number of other Judges as His Majesty may deem necessary. The appointment was to be made by a Warrant under the Royal Sign Manual and each Judge was to hold office till the age of 65 years and the Judge could be removed in the same manner as a High Court Judge. The seat of the Federal Court was to be at Delhi. Section 204 spoke about the original jurisdiction of the Federal Court and 205 made provisions for the appellate jurisdiction of the Court in Appeals from High Courts in British India. Section 208 laid down that an Appeal may be brought to His Majesty in Council from a decision of the Federal Court on certain grounds. The relevant sections are quoted below:

203. The Federal Court shall be a court of record and shall sit in Delhi and at such other place or places, if any, as the Chief Justice of India may, with the approval of the Governor-General from time to time appoint.

204. (1) Subject to the provisions of this Act, the Federal Court shall to the exclusion of any other court, have an original jurisdiction in any dispute between any two or more of the following parties, that is to say, the Federation, any of the Provinces or any of the Federated States, if and in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends;

Provided that the said jurisdiction shall not extend to (a) a dispute to which a State is a party, unless the dispute——

- (i) concerns the interpretation of this Act or of an Order in Council made thereunder, or the extent of the legislative or executive authority vested in the Federation by virtue of the Instrument of Accession of that State: or
- (ii) arises under an agreement made under Part VI of this Act in relation to the administration in that State of a law of the Federal Legislature, or otherwise concerns some matter with respect to which the Federal legislature has power to make laws for that State; or
- (iii) arises under an agreement made after the establishment of the Federation, with the approval of His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States, between that State and the Federation or a province, being

to an agreement which expressly provides that the said jurisdiction shall extend to such a dispute:

(b) a dispute arising under any agreement which expressly provides that the said jurisdiction shall, not extent to such a dispute.

(2) The Federal Court in the exercise of its original jurisdiction shall not pronounce any judgment other than a declaratory judgment.

205. (1) An appeal shall lie to the Federal Court from any judgment, decree or final order of a High Court in British India, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Act or any Order in Council made thereunder, and it shall be the duty of every High Court in British India to consider in every case whether or not any such question is involved and of its own motion to give or to withhold a certificate accordingly.

(2) Where such a certificate is given, any party in the case may appeal to the Federal Court on the ground that any such question as aforesaid has been wrongly decided, and on any ground on which that party could have appealed without special leave to His Majesty in Council if no such certificate had been given, and with the leave of the Federal Court, on any other ground, and no direct appeal shall lie to His Majesty in Council, either with or without special leave.

206. (1) The Federal Legislature may by Act provide that in such civil cases as may be specified in the Act an appeal shall lie to the Federal Court from a Judgment, decree or final order of a High Court in British India without any such certificate as aforesaid, but no appeal shall lie under any such Act unless—

(a) The amount or value of the subject matter of the dispute in the Court of first instance and still in dispute on appeal was and is not less than fifty thousand rupees or such other sum not less than fifteen thousand rupees as may be specified by the Act, or the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value: or

(b) the Federal Court gives special leave to appeal.

(2) If the Federal Legislature makes such provision as is mentioned in the last preceding subsection, consequential provision may also be made by Act of the Federal Legislature for the abolition in whole or in part of direct appeals in civil cases from High Courts in British India to His Majesty in Council, either with or without special leave.

(3) A Bill or amendment for any of the purposes specified in this section shall not be introduced into, or moved in, either Chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion.

207. (1) An appeal shall lie to the Federal Court from a High Court in a Federated State on the ground that a question of law has been wrongly decided, being a question which concerns the interpretation of this Act or of an Order in Council made thereunder or the extent of the legislative or

executive authority vested in the Federation by virtue of the Instrument of Accession of that State, or arises under an agreement made under Part VI of this Act in relation to the administration in that State of a law of the Federal Legislature.

(2) An appeal under this section shall be by way of special case to be stated for the opinion of the Federal Court by the High Court and the Federal Court may require a case to be so stated, and may return any case so stated in order that further facts may be stated therein.

208. An appeal may be brought to His Majesty in Council from a decision of the Federal Court—

(a) From any judgment of the Federal Court given in the exercise of its original jurisdiction in any dispute which concerns the interpretation of this Act or of an Order in Council made thereunder, or the extent of the legislative or executive authority vested in the Federation by virtue of the Instrument of Accession of any State, or arises under an agreement made under Part VI of this Act in relation to the administration in any State of a law of the Federal Legislature, without leave: and

(b) in any other case, by leave of the Federal Court or of His Majesty in Council.

Section 109 of the Code of the Civil Procedure laid down as to when appeals lay to the King in Council. Section 111-A of the Code related to Appeals to Federal Court. Section 205 of the Government of India Act 1935, as quoted above, related to the Appellate jurisdiction of the Federal Court. It provided that a certificate was necessary from the High Court if any Appeal against its decision was to be preferred to the Federal Court. Section 111-A of the Code of Civil Procedure provided that where such a certificate has been given the provisions in Sections 109, 110 and 111 of the Code shall apply in relation to the Appeals in Federal Court as they apply in relation to the Appeals to His Majesty in Council provided that in determining whether the case is a fit one for Appeal or whether the Appeal involves a substantial question of law or any question of law as to the interpretation of the Government of India Act, 1935 or any order in Council made therein shall be left out of account. Appeals to the Privy Council were provided for in Clause 39 of the Letters Patent. Section 122 of the Code of Civil Procedure invested the High Courts established under the High Courts Act, 1861 or the Government of India Act, 1915-19 or the Subsequent Acts to make rules. It is a branch of delegated Legislation and the rules so made are to be treated as part of the Statute. The rules which are to follow in consequence of the provision in Section 122 and to Constitution of a Rule making Committee etc. are provided in the Code itself they are quoted below:

The following provisions of C. P. Code, 1908 as amended in 1976 regarding powers of the High Courts to make rules are important:

Sec. 123. (1) A Committee to be called the Rule Committee, shall be constituted at the town which is the usual place of sitting of each of the High Courts.

(2) Each such Committee shall consist of the following persons, namely—

- (a) three Judges of the High Court established at the town at which such Committee is constituted, one of whom at least has served as a District Judge or a Divisional Judge for three years;
- (b) two legal practitioners enrolled in that Court;
- (c) a Judge of a Civil Court subordinate to the High Court, and
- (d) in the towns of Calcutta, Madras and Bombay, an attorney.

(3) The members of each such Committee shall be appointed by the High Court, who shall also nominate one of their number to be president.

(4) Each member of any such Committee shall hold office for such period as may be prescribed by the High Court in this behalf: and whenever any member retires, resigns, dies or ceases to reside in the State in which the Committee was constituted, or becomes incapable of acting as a member of the Committee, the said High Court may appoint another person to be a member in his stead.

(5) There shall be a Secretary to each such Committee, who shall be appointed by the High Court and shall receive such remuneration as may be provided in this behalf by the State Government.

Sec. 124. Every Rule Committee shall make a report to the High Court established at the town at which it is constituted on any proposal to annul, alter or add to the rules in the First Schedule or to make new rules, and before making any rules under section 122 the High Court shall take such report into consideration.

Sec. 125. High Courts, other than the Courts specified in section 122, may exercise the powers conferred by that section in such manner and subject to such conditions as the Governor-General in Council may determine:

Provided that any such High Court may, after previous publication, make a rule extending within the local limits of its jurisdiction any rules which have been made by any other High Court.

Sec. 126. Rules made under the foregoing provisions shall be subject to the previous approval of the Government of the State in which the Court, whose procedure the rules regulate, is situate or, if that Court is not situate in any State, to the previous approval of the Central Government.

Sec. 127. Rules so made and approved shall be published in the official Gazette, and shall from the date of publication or from such other date as may be specified have the same force and effect, within the local limits of the jurisdiction of the High Court which made them, as if they had been contained in the First Schedule.

Sec. 128. (1) Such rules shall be not inconsistent with provisions in the body of this Code, but, subject thereto, may provide for any matters relating to the procedure of Civil Courts.

(2) In particular, and without prejudice to the generality of the powers

conferred by subsection (1) such rules may provide for all or any of the following matters, namely—

- (a) the service of summonses, notices and other processes by post or in any other manner either generally or in any specified areas and the proof of such service:
- (b) the maintenance and custody, while under attachment, of live-stock and other moveable property, the fees payable for such maintenance and custody, the sale of such live stock and property and the proceeds of such sale:
- (c) procedure in suits by way of counter claim, and the valuation of such suits for the purposes of jurisdiction:
- (d) procedure in garnishee and charging orders either in addition to, or in substitution for, the attachment and sale of debts:
- (e) procedure where the defendant claims to be entitled to contribution or indemnity over against any person whether a party to the suit or not:
- (f) summary procedure—
 - (i) in suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest arising—
on a contract express or implied, or
on an enactment where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or
on a guarantee, where the claim against the principal is in respect of a debt or a liquidated demand only; or on a trust; or
 - (ii) in suits for the recovery of immoveable property, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or has become liable to forfeiture for non-payment of rent, or against persons claiming under such tenant:
- (g) procedure by way of originating summons:
- (h) consolidation of suits, appeal and other proceedings;
- (i) delegation to any Registrar, Prothonotary or Master or other official of the Court of any judicial, quasi-judicial and non-judicial duties; and
- (j) all forms, registers, books, entries and accounts which may be necessary or desirable for the transaction of the business of Civil Courts.

Sec. 129. Notwithstanding anything in this Code, any High Court not being the Court of a Judicial Commissioner may make such rules not inconsistent with the Letters Patent or order of the law establishing it to regulate its own procedure in the exercise of its original civil jurisdiction as it shall think fit, and nothing herein contained shall affect the validity of any such rules in force at the commencement of this Code.

Sec. 130. A High Court not being a High Court to which Sec. 129 applies may, with the previous approval of the State Government, make with respect to any matter other than procedure, any rule which a High Court for a State might under article 227 of the Constitution make with respect to any such matter for any part of the territories under its jurisdiction which is not included within the limits of a Presidency-Town.

Sec. 131. Rules made in accordance with section 129 or section 130 shall be published in the official Gazette, and shall from the date of publication or from such other date as may be specified have the force of law.

The rules of the Presidency Small Cause Courts are made by the High Court under the powers conferred by Section 9 of the Presidency Small Cause Courts Act, 1882, as amended by the Act of 1895. Order 42 rule 2 of the said rules of Madras which requires at the time of presenting an application for a new trial either the deposit in court of the decree amount or the giving of security for the due performance of the decree is inconsistent with the statutory rights given by section 38 of the Presidency Small Cause Courts Act, and *ultra vires* for "to deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure". And the right to apply for a new trial is not a matter of practice or procedure (*p*).

Rule 49 of the Civil Rules of Practice (Madras) requires the production of a printed copy of the judgment appealed against along with the memorandum of appeal when the judgment contains more than 700 words, but having regard to section 652, Civil Procedure Code, 1882, that rule being inconsistent with section 541 was *ultra vires* of the High Court and that under sections 122, 128 of the Civil Procedure Code, 1908, the High Court has power to enact rules not inconsistent with the rules in the Code, section 157 has not the effect of validating a rule which was *ultra vires* at the time of its enactment (*q*).

Rule 105 of the appellate side Rules of practice, viz., "The appeal shall be liable to be dismissed for default of prosecution if any of the papers mentioned in this rule have not been printed owing to the appellant's failure to make the necessary deposit therefore," is not *ultra vires* of the High Court (*r*).

When a criminal appeal is admitted by the High Court, the whole appeal becomes admitted and a restrictive order for admission on a particular ground such as severity of sentence is outside the scope of new sections 421 and 422 Criminal Procedure Code and is *ultra vires* (*s*).

When a Judge in the exercise of the ordinary original jurisdiction of the High Court at Madras directed a warrant to issue against the person of a

(*p*) *Madurai Pillai v. T. Mithu Chetty*, 38 Mad. 823 F. B.

(*q*) *Ramakrisina Pillai v. Muthu Perumal Pillai*, 29 M. L. J. 663 = 31 I. C. 924.

(*r*) *Parkum Chupothi Ammad v. Ambalathan Kandi*, 29 M. L. J. 784.

(*s*) *Nafar Sheikh v. Emp.* 41 Cal. 406.

judgment-debtor *to be executed wherever he may be found in the Presidency of Madras*, the order was held to be without jurisdiction (t).

A district Judge had no jurisdiction to make an order under section 5 of Regulation V of 1799, if no regular suit has been brought by the persons claiming the property with which he has dealt (u).

What have been stated above are all matters of history. It is necessary, however, to follow up the discussion by a reference to the Constitution and jurisdiction of the High Courts and the Supreme Court as contained in the Constitution of India which commenced to operate in our Independent India since January 26, 1950. Under the Constitution, India is a Union of States and the Territory of India comprised the territories of the States, the Union Territories and such other territories as may be acquired. The Parliament may by law admit into the Union or establish new States on such terms and conditions as it thinks fit. The separate High Courts in the States find place in Chapter 5 of Part VI of the Constitution of India. Under the Constitution every High Court shall be a Court of Record and shall have all the powers of such a Court including the power to punish for contempt of itself. The President shall appoint a Judge of the High Court

High Courts and the Supreme Court under the Constitution of India.

and the Judge is to hold office till he attains the age of 62 years. A Judge may be removed from his office by the President in the same manner as is provided for the removal of the Judge of the Supreme Court. Every

person appointed a Judge shall make and subscribe before the Governor of the State an oath set out in the 3rd Schedule of the Constitution. Article 220 places a restriction upon a permanent Judge of a High Court from pleading or acting in any Court if he has ceased to hold the office of a Judge of that Court. In other words he may practice in the Supreme Court or in other High Courts but not in the High Court which he served as a Judge. The jurisdiction of the High Court is provided for in Article 225 and 226 of the Constitution. They are discussed in a different lecture and therefore are not elaborated here. Article 227 relates to the power of superintendence over all Courts by the High Court and Article 228 speaks of transfer of certain cases to the High Court. Article 229 relates to officers and servants of the High Court, 230 relates to extension of jurisdiction of High Courts to Union Territories and Article 231 relates to establishment of a common High Court for two or more States. Chapter 6 of this part of the Constitution relates to subordinate Courts. Appointment of persons to be, and the posting and promotion of District Judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State. Appointment includes promotion and the consultation with the High Court is mandatory. Consultation with some other Board would be a contravention of the Article and any appointment made without consulting the High Court would be invalid *Chandra Mohan v.*

(t) *Rajah of Ramand v. Seetharam Chetty*, 26 Mad. 120.

(u) *Balia Koer v. Bandh Ram*, 38 I. C. 512.

State of U. P. (v). Article 234 lays down that appointment of persons other than District Judges to the Judicial Services of a State shall be made by the Governor of the State in accordance with Rules made by him in that behalf after consultation with the State Public Service Commission and with the High Courts exercising jurisdiction in relation to such States. These powers do not include the power to confirm or promote a judicial officer other than District Judges because that power is vested exclusively in the High Court as will presently appear *State of Assam v. Sen (w).* This becomes clear from Article 235 of the Constitution which relates to control over Subordinate Courts. It says that the control over District Courts and Courts Subordinate thereto including the posting and promotion of and the grant of leave to, persons belonging to the Judicial Services of a State and holding any post inferior to the post of District Judge shall be vested in the High Court but nothing in this Article shall be considered as taking away from any such person any right of Appeal which he may have under the law regulating the condition of his service or authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law (x). But the High Court cannot terminate the services of the judicial officers or impose any punishment by way of reduction in rank because these powers belong to the Governor who makes the appointment or who is the Appointing Authority(y). At the same time the Government cannot make order for compulsory retirement of a judicial officer without the recommendation of the High Court or against the recommendation of the High Court (z). This is so because compulsory retirement is neither dismissal nor removal nor does it amount to reduction in rank.

Now we may refer to the provisions in the Constitution for the establishment and functioning of the Supreme Court of India. This is dealt with in Articles 124 to 147 in Chapter 4 under Part 5 of the Constitution. Article 124 says there shall be a Supreme Court of India consisting of a Chief Justice of India and such number of Judges as the Parliament by law determine. A person to be qualified for appointment as a Judge of the Supreme Court must be a Citizen of India and has been at least for five years a Judge of a High Court of India or has been at least 10 years an Advocate of a High Court or in the opinion of the President a distinguished Jurist. Some appointments may be made for ad-hoc Judges. The Supreme Court shall be a Court of Record and shall have all the powers of such Court including the powers to punish for contempt of itself. It shall have both original and Appellate Jurisdiction. So far as the original is concerned the Supreme

(v) A. I. R. 1966 S. C. 1987.

(w) A. I. R. 1972 S. C. 1028.

(x) *High Court, Calcutta v. Amal Kr. Roy*, A. I. R. 1962 S. C. 174.
Baroda Kanta v. High Court, A. I. R. 1976 S. C. 1899;
High Court v. State of Hariyana, A. I. R. 1975 S. C. 613, *State of West Bengal v. N. N. Bagchi*, A. I. R. 1960 S. C. 447.

(y) *Baroda Kanta v. High Court*, A. I. R. 1967 S. C. 1899.

(z) *State of Haryana v. Inaier*, A. I. R. 1976 S. C. 1841,

Court shall, to the exclusion of any other Court, have jurisdiction in any dispute—(a) between the Government of India and one or more States or (b) between the Government of India or any State on one side and one or more other States on the other or (c) between two or more States if and in so far as the dispute involves any question whether of law or fact on which the existence or extent of a legal right depends. The Supreme Court cannot however, under Article 131 give a complete adjudication of the dispute. It can only give its decision on questions of law or fact relating to the scope and existence of a legal right claimed (a). Article 132 speaks of the Appellate jurisdiction and permits Appeal involving interpretation of the Constitution even though such Appeals arose out of Civil/Criminal or other proceedings of a High Court. In an Appeal against the conviction the law under which the conviction has been made may be challenged as *ultra vires*, *Keshori v. King* (b), or where a Statute is challenged as *ultra vires* in a suit *State of Punjab v. Shadilal* (c), *Bhairabendra v. State of Assam* (d), or where an executive order or a law is challenged to have contravened any of the fundamental rights, *Ganapati v. State of Bihar* (e), and *Budhan Chowdhury v. State of Bihar* (f).

Article 133 relates to the Appellate Jurisdiction of the Supreme Court on Appeals from High Courts in regard to Civil matters and 134 relates to that in regard to Criminal matters. Article 136 makes provision for special leave to Appeal by the Supreme Court. It is purely Appellate Jurisdiction. a discretionary matter for the Supreme Court to grant a special leave to Appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any Court or tribunal in the territory of India. The power under this Article is to be exercised sparingly and in exceptional cases, *State of Maharashtra v. Dadaniya* (g), Article 137 empowers the Supreme Court to review its own judgments and orders, obviously to avoid injustice, *Mohindra v. District Judge* (h), Article 32 which appears under the Chapter on Fundamental Rights empowers the Supreme Court to issue directions or orders or writs including the writs in the nature of Habeas Corpus, mandamus, prohibition, quo-warranto and certiorari which may be appropriate for the enforcement of any of the fundamental rights mentioned in part III of the Constitution. Article 139 confers powers on the Supreme Court to issue the above writs for any purposes other than those mentioned in Article 32. The ancillary powers of the Supreme Court may be conferred upon it by specific laws by the Parliament but these powers must be supplementary to and not

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- (a) *Bihar v. Union of India*, A. I. R. 1970 S. C. 1446.
 - (b) A. I. R. 1950 F. C. 37.
 - (c) A. I. R. 1960 S. C. 397.
 - (d) 1956 S. C. A. 736.
 - (e) A. I. R. 1955 S. C. 188.
 - (f) A. I. R. 1955 S. C. 191.
 - (g) A. I. R. 1971 S. C. 1722.
 - (h) A. I. R. 1971 S. C. 107.

inconsistent with any of the provisions of the Constitution. Article 141 lays down that the law declared by the Supreme Court shall be binding on all Courts within the territory of India though the Supreme Court itself is not bound by its own decision, *Dwarkadas v. Sholapur Spinning Co.* (i), and *Keshab Mills v. I. T. Commissioner* (j).

Article 143 speaks of the power of the President to consult the Supreme Court in matters in which a question of law or fact which arises or is likely to arise and which is of such a nature and of such public importance that the President feels it expedient to obtain the opinion of the Supreme Court upon it.

President may Consult the Supreme Court.

The President may refer that question to that Court for consideration and the Court may, after such hearing as it thinks fit, report to the President its *opinion* thereon. This is the consultative function of the Supreme Court and has been borrowed from Section 213 of the Government of India Act, 1935 which empowered the Governor-General to refer such question to the Federal Court and obtain its opinion. Under the Constitution of India several matters were placed by the President before the Supreme Court for opinion under Article 143 and they include a reference on the functions and duties of the President (k); Kerala Education Bill (k-1), the Delhi Laws Act (k-2), Implementation of the Indo-Pakistan Agreement (l), Sea Customs Act (m), and more recently the Special Courts Bill 1978 relating to the excesses said to have been committed during, before and after the emergency declared during the Prime Ministership of Smt. Indira Gandhi. In the Special Courts Bill matter the Supreme Court said that the President was competent to refer questions of fact and at the same time the Supreme Court can decline to answer the reference when the reference is hypothetical or speculative in character or omnibus. Commenting on the Special Courts Bill, the Supreme Court said if we hold that the bill is valid the Parliament may proceed with it and we suppose that if we hold that the bill is invalid the Parliament will not spend any time over passing a constitutionally invalid bill. The proceeding under Article 32(1) being of quite a different nature from the proceeding contemplated by Article 143(1) of the Constitution there is neither supplementing nor abrogation of Article 32 if we pronounce upon the question referred to us by the President (n).

Article 144 of the Constitution specifically lays down that all Authorities, Civil and Judicial in the Territory of India shall act in aid of Supreme Court adopted from Sec. 210 of the Government of India Act, 1935. Article 145 empowers the Supreme Court to make rules for regulating the practice and

(i) A. I. R. 1954 S. C. 119.

(j) A. I. R. 1965 S. C. 1630.

(k) A. I. R. 1965 S. C. 755.

(k-1) A. I. R. 1958 S. C. 956.

(k-2) 1951 S. C. R. 747.

(l) A. I. R. 1960 S. C. 845.

(m) A. I. R. 1963 S. C. 975.

(n) A. I. R. 1979 S. C. 478.

procedure of the Court. Article 146 relates to Officers and Servants and expenses of the Supreme Court.

The Supreme Court came into existence on 26th January, 1950 and the inaugural sitting of the Court was held on 28th January, 1950. At this sitting referring to the role of Court in interpreting the Constitution Chief Justice Kania said: the duty of interpreting the Constitution with an enlightened liberality falls on the Supreme Court. It will declare and interpret the law of the land and with high tradition behind the judiciary of this country, we are convinced that the work will be done in no spirit of formal or barren legalism. It will be our endeavour to interpret the Constitution not as a rigid body but as a living organism having within itself the force

Responsibility of the Supreme Court. and power of self-government. We trust that in doing so we shall allow the Constitutional usages and conventions recognized in all civilised independent countries

to be respected. The Supreme Court, however, under the colour of interpretation can not alter or amend the law. Within the limits prescribed we are quite sure that the Supreme Court will be able to make a substantial contribution towards the formation of India into a great unit retaining its own civilisation, traditions and customs. With the establishment of the Supreme Court of India we shall develop our own jurisprudence based on our historical background and we trust that that will be an important and useful contribution to the creation of International Law. (Setalvad, *My Life, Law and Other Things*, page 150.)

The discussion relating to the field of judiciary will be incomplete without reference, very briefly, to the International Court of Justice which is otherwise known as the World Court. It consists of 15

The World Court. Judges with a President and Vice-President elected by the members of the Court among themselves the Judges being elected by the Security Council and the General Assembly of the United Nations. They are elected for 9 years and are also qualified for re-election. The Court exercises jurisdiction over States which are parties to the Statute and according to Article 94 of the United Nations Charter each Member of the United Nations undertakes to comply with the decision of the World Court in any case to which it is a party. The jurisdiction of the Court may be divided into three categories—(a) voluntary, (b) obligatory and (c) advisory. In the first category the parties may by agreement refer their dispute to the Court or any one party may refer its dispute while the other party qualifies its assents to the same. In the second category are those cases where the parties to the suit accept the application of referring their legal disputes to the Court in matters of interpretation of a treaty on questions of International Law, the existence of any fact which would constitute a breach of an International obligation and the extent or nature of reparation for such breach. To sum up no State can be compelled to bring its litigation or dispute to the World Court without its consent. So far as the Advisory Jurisdiction is concerned the Security Council or the General Assembly may refer any point to the World Court seeking its advice or opinion though such advisory opinion is

not binding upon the parties. In deciding the *lis* before it the World Court has to apply the International convention recognised by the contesting States, International customs generally in practice, general principles of law and judicial decisions of qualified publicists and jurists. Uptil now several cases have come before the World Court for decision and India was directly involved in a case before it on the Portugese possessions situated in Daman on the West Coast of India and popularly known as the Dadra Nagar Haveli Case. Setalvad had appeared in that case for India and how the proceedings go on before the World Court has been excellently described by him in his autobiography in the following words. "The Court languages were in English and French. But it will appear that majority of the Judges preferred French to English. Copies of the speeches usually are given to the interpreters for the purpose of assisting them in the task of translation. Counsel addressing in English or French would interrupt his speech at a convenient place for time in order to enable the interpreters to translate what the Counsel had stated from English into French or vice-versa, the Counsel taking his seat in the meanwhile. . . . rarely did a Judge ever ask a question. Nor did the Judges appear to take any notes. They sat almost impassively through the proceedings. Some of them even read books or appeared to sleep during the proceedings. . . . At least, all the Judges wore dark glasses so that it was difficult to decide whether they attended to the proceedings or not. (Setalvad *My Life* etc. p. 305). We leave it at that.

Section 9 of the Code of Civil Procedure lays down that the Courts shall subject to the provisions herein contained have jurisdiction to try all suits of a civil nature except any suits of which their cognizance either expressly or impliedly barred. A suit in which the right to property or to an office is contested is a suit of civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies. The exclusion of Civil Court's Jurisdiction should not be lightly inferred. Such exclusion must either be explicitly expressed or implied. Even if the jurisdiction is so excluded the Civil Courts still have to examine the cases where the provisions of any Act have not been complied with or statutory tribunal has not acted in conformity with the norms of judicial procedures, *Secy of State v. K. Mask and Co. (o)*. This principle was laid down by the Privy Council. The Supreme Court in two later decisions examined the theory as propounded by the Privy Council. The Supreme Court said whenever it is urged before a Civil Court that its jurisdiction is excluded either expressly or by necessary implication to entertain claims of civil nature, the Court naturally feels inclined to consider whether the remedy afforded by different provisions proscribed by special Statute were sufficient or adequate. In cases where the exclusion of the Civil Court's jurisdiction is expressly provided for, the consideration as to the claim of the statute in question and the adequacy or insufficiency of the remedies provided for by

Exclusion of Jurisdiction of Civil Courts.

it may be relevant but cannot be decisive. But where exclusion has been completed as a matter of necessary implication, such consideration would be very important and inconceivable circumstances might even become decisive. If it appears that a Statute creates a special right or a liability and provides for the determination of the right and liability to be dealt with by tribunal specially constituted in that behalf and it further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted it will be pertinent to enquire whether remedies normally associated with actions in Civil Courts are prescribed by the said Statute by its language (p). In another case the Supreme Court says that where the question is whether the jurisdiction of the civil court is barred by any provision in a statute the tests which are applied are (a) whether the Statute has used clear and unambiguous words indicating the intention to exclude such jurisdiction and (b) whether the Statute provides for an adequate and satisfactory alternative remedy under its material provisions to a party who may be aggrieved. But the power created by the provisions of the Statute excluding the jurisdiction of the Civil Court cannot operate in cases where the plea raised before the Civil Court goes to the root of the matter and could, if upheld, lead to the conclusion that the impugned order is a nullity (q).

(p) *Kamala Mills v. State of Bombay* 1965 S. C. A. 233.
 (q) *Ram Swaroop v. Sikarchand* 1966-1 S. C. A. 628.

CONSTITUTION OF INDIA

Partial provincial autonomy was introduced in India by the scheme of dyarchy under the Government of India Act, 1919. In order to meet the constant demand for full responsible government based on a transference of political power to the people of India the idea of introducing a federal government for the whole of India including the Indian States was evolved and in 1930 Simon Commission was appointed for recommending the adoption of a federal constitution for the country and obviously with sufficient safeguards. The Commission in making the recommendations observed: We recognise that a change from the unitary to a federal system is unusual. Federation has often been an intermediate process whereby independent States have agreed to relinquish part of their sovereignty before they were ready to merge their separate identities in a unitary state. The general tendency in federations once formed has been towards increased centralisation. The Commission explained that it was recommending the reverse process because of the peculiar features of the Indian problem, the vast area of the country and its large population. So India moved from autocracy to democracy. In accepting the Commission's recommendations the Joint Committee of Parliament observed: At present, the British India provinces are not even autonomous for they are subject to both the administrative and the legislative control of the Government of India, and such authority as they exercise has in the main been devolved upon them under a statutory rule-making power by the Governor-General in Council. We are faced therefore with the necessity of creating autonomous units and combining them into a federation by one and the same act. But it is obvious that we have no alternative.

From Autocracy to
Democracy.

Thus came the Government of India Act, 1935 which for the first time introduced a federal constitution in India but it was the outcome of a decision taken by the British Parliament which was the Supreme law making body for India then. But there was a formidable clog in the wheel of operation of this federal system. A brief resume' of the Government of India Act, 1935 has already been given. British India, as it then was, was being governed on a unitary basis. The Indian India (i.e., the Native States) were under the suzerainty of the British Crown and their essential functions like the defence, foreign affairs and communications were fully controlled by the Government of India. These States declined to join the federation and the Federal Part of the Constitution, so far as the Centre was concerned, never came into operation. That was still-born and the result was that till 1949 the Government at the Centre was conducted under the 1919 Act. In substance, therefore,

there was no complete transfer of power as was demanded by the All-Parties Conference in 1928. That demand continued. Things moved very fast. Second World War thundered and roared. A Cabinet Mission came to India and after prolonged and protracted deliberations and negotiations the Cabinet Mission Plan of May 16, 1946 beckoned the desired light and a Constituent Assembly was set up for drawing up the Constitution of India covering British India and the Indian States. What followed next is a matter of recent memory and it will not be appropriate to enter into further details in these lectures. It can only be said that the British Parliament passed the Indian Independence Act, 1947 which set up two independent dominions of India and Pakistan and provided for the Constituent Assembly for the

The Constitution of India.

Dominion of India for drawing up the Constitution of India and under the Act the British paramountcy or the suzerainty of the British Crown over the Indian

States lapsed. On 26th of November 1949 in the Constituent Assembly at New Delhi the people of India adopted, enacted and gave to themselves the CONSTITUTION OF INDIA which has been described by Prof Wheare thus: It establishes, indeed, a system of government which is at most quasi-federal, almost devolutionary in character; a unitary state with subsidiary federal features rather than a federal state under subsidiary unitary features.

The provisions regarding the distribution of legislative powers and the structures thereof as between the Union and the States are largely the same as in the 1935 Act, which had laid down in Sec. 100 as follows:

100.—(1) Notwithstanding anything in the two next succeeding subsections, the Federal Legislature has, and a Provincial Legislature has not, power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule to this Act (hereinafter called the "Federal Legislative List").

Subject Matter of Federal and Provincial Laws.

(2) Notwithstanding anything in the next succeeding subsection, the Federal Legislature, and, subject to the preceding subsection, a Provincial Legislature also, have power to make laws with respect to any of the matters enumerated in List III in the said Schedule (hereinafter called the "Concurrent Legislative List").

(3) Subject to the two preceding subsections, the Provincial Legislature has, and the Federal Legislature has not, power to make laws for a Province or any part thereof with respect to any of the matters enumerated in List II in the said Schedule (hereinafter called the "Provincial Legislative List").

(4) The Federal Legislature has power to make laws with respect to matters enumerated in the Provincial Legislative List except for a Province or any part thereof.

The principles of interpretation of the Federal Constitution of 1935 have been succinctly laid down by Sir Maurice Gwyer, the first Chief Justice of the Federal Court of India in these words (1): This is the first case of importance that has come before the Federal Court; and it is desirable to

refer briefly to certain principles which the Court will take for its guidance. It will adhere to canons of interpretation and construction which are now well known and established. It will seek to ascertain the meaning and intention of Parliament from the language of the statute itself; but with the motives of Parliament it has no concern. It is not for the Court to express, or indeed to entertain, any opinion on the expediency of the particular pieces of legislation, if it is satisfied that it was within the competence of the Legislature which enacted it; nor will it allow itself to be influenced by any considerations of policy, which lie wholly outside its sphere.

Interpretation of
Federal Constitution.

The Judicial Committee have observed that a Constitution is not to be construed in any narrow and pedantic sense as said by Lord Wright in *James v. Commonwealth of Australia* (a). The rules which apply to the interpretation of other statutes apply, it is true, equally to the interpretation of a constitutional enactment. But their application is of necessity conditioned by the subject-matter of the enactment itself, and I respectfully adopt the words of a learned Australian Judge: 'Although we are to interpret the words of the Constitution on the principles of interpretation as we apply to ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act that we are interpreting—to remember that it is a Constitution, a mechanism under which laws are to be made, and not a mere Act which declares what the law is to be' *Attorney General for New South Wales v. Brewery Employees Union* (b). Specially is this true of a federal constitution with its nice balance of jurisdictions. I conceive that a broad and liberal spirit should inspire those whose duty is to interpret it; but I do not imply by this that they are free to stretch and pervert the language of the enactment in the interest of any legal or constitutional theory; or even for the purpose of supplying omissions or correcting supposed errors. A Federal Court will not strengthen, but only derogate from its position' if it seeks to do anything but declare the law; but it may rightly reflect that a constitution of government is a living and organic thing, which of all instruments has the greatest claim to be construed *ut res magis valeat quam pereat* (c).

A Living and Organic
Thing.

Disputes with regard to central and provincial spheres are inevitable under every federal constitution, and have been the subject-matter of a long series of cases in Canada, Australia and the United States as well as of numerous decisions on appeal by the Judicial Committee. The decisions of Canadian and Australian Courts are not binding upon us, and still less those of the United States, but where they are relevant they will always be listened to in this Court with attention and respect, as the judgments of eminent men accustomed to expound and illumine the principles of jurisprudence similar to our own and if this Court is so fortunate as to

(a) 1936 A. C. 578 at 614.

(b) 1908 Commonwealth Law Reports, 459 per Higgins J at p. 611.

(c) In re. The Central Provinces & Berar Act No. XIV of 1938, 1. F. C. R. 36.

find itself in agreement with them, it will deem its opinion to be strengthened and confirmed. But there are few subjects on which the decisions of other Courts require to be treated with greater caution than that of federal and provincial powers, for in the last analysis the decision must depend upon the words of the Constitution which the Court is interpreting; and since no two Constitutions are in identical terms, it is extremely unsafe to assume that a decision on one of them can be applied without qualification to another. This may be so even where the words or expressions used are the same in both cases; for a word or a phrase may take a colour from its context and bear different senses accordingly.

Dr. P. B. Mukharji has very rightly said: "The Indian Constitution is impressed with three major loyalties. They all indicate that the structure was intended to be Federal or quasi-Federal. The first loyalty of the Indian Constitution is to the Government of India Act, 1935 which provides not

Loyalties to the 1935 Act. only most of the flesh and blood of the present Constitution, but also a good part of its spirit. Indeed the Constitution even copies textually totidem verbis some of the provisions of the Government of India Act, 1935. That Act created a new Federal Legislature and was directed to reform the then Provincial Government and to set up a new and novel relationship with what was then called the Princely States in India. The legacy for federalism, therefore, in the present Indian Constitution is drawn primarily from the Government of India Act, 1935. The second loyalty is to the American Constitution. From that Constitution is drawn the inspiration for widespread judicial review of laws and governmental actions, fundamental rights guaranteed by the Constitution and such federal processes as inter-state trade and commerce. The American *due process* clause has been formally disclaimed but it survives under the nomenclature of "Reasonable Restrictions". The hand is the hand of Essau but the voice is the voice of Jacob. This American influence has also given a federal bias to the Indian Constitution. The third loyalty owed by the Indian Constitution is to the British Constitution. The judicial writs mentioned in the Indian Constitution are copies of old English writs, no doubt modified and adjusted to the context of India. The very names of these writs in the Indian Constitution carry with them the characteristics they had acquired in British Constitutional history. Indian Parliament and State Legislatures draw their patterns from the British model. These three loyalties are not always reconcilable and sometimes divergent and self-contradictory. The Colonial traditions of suspicion for local autonomy and decentralisation, the federal American tradition of distrust of a too powerful centre and the unitary tradition of the British Constitution have been dovetailed into the Indian Constitution to produce its peculiar federalism in constitutional law. There are other minor loyalties. The Indian Constitution has drawn upon many other constitutions in the world, for instance of Canada and Australia, the Irish Free State and specially its Directive Principles and the Weimar Constitution. The defects of federalism arising on this score and the defects

of eclecticism in constitutional law which appear to ignore the fact that a Constitution embellished by the tessellated mosaic set by variegated marbles selected exotically is not necessarily strong for the traffic and tension it has to bear in the political, social and economic evolution of the nation whose Constitution it is (d).

Subject to the restrictions contained in the Constitution the Parliament and the State Legislatures have plenary powers and they are supreme in their prescribed spheres. They are, however, competent to delegate their powers provided they preserve their capacity and do not abdicate their functions. It was settled by the majority judgment in the Delhi Laws Act Case (e) that the essential powers of legislation cannot be delegated. The legislature must declare the policy of the law and the legal principles which are to control any given cases and must provide a standard to guide the officials or the body in power to execute the law. The essential legislative function consists in the determination or choice of the legislative policy and of formally enacting that policy into a binding rule of conduct. Again in *Maganbhai's case* the Supreme Court said that in dealing with the challenge to the *vires* of any statute on the ground of excessive delegation, it is necessary to inquire whether the impugned delegation is of an essential legislative function or power and whether the legislature has enunciated its policy and principle and given guidance to the delegate. In applying this test the Court takes into account the preamble to the Act and if the statements in the preamble affords a satisfactory basis for holding that the legislative policy and principle has been enunciated with sufficient accuracy and clarity the preamble itself has been held to satisfy the requirements of the relevant tests. In every case it would be necessary to consider the relevant provisions of the Act in relation to the delegation made and the question as to whether the delegation is *intra vires* or not still have to be decided by the relevant test (f). So long therefore as the Legislature indicates in the operative provisions of the statute with certainty, the policy and purpose of the enactment, the mere fact that the legislation is skeletal or the fact that a discretion is left to those entrusted with administering the law, affords no basis either for the contention that there has been an excessive delegation of legislative power as to amount to an abdication of its functions, or that the discretion vested its uncanalised and unguided as to amount to a *carte blanche* to discriminate. If the power or discretion has been conferred in a manner which was legal and constitutional the fact that Parliament could possibly have made more detailed provision could not be a ground for invalidating the law (g). Power to legislate is plenary and though the doctrine of *delegatus non potest dele-*

(d) P. B. Mukharji, *Setalvad Lectures*, 1966 (University of Bombay, p. 129-30).

(e) *In re Delhi Laws Act*, 1912, (1951) S. C. R. 747.

(f) *V. Maganbhai Sanjanwala v. State of Bombay*, (1961) S. C. J. 394 Following *Harishankar Bagla v. State of Madhya Pradesh*, (1955) S. C. R. 380; See also, *Hamdard Dawakhana v. Union of India*, (1960) 2 S. C. R. 671.

(g) *Jyoti Prasad v. Admntr. for Delhi*, (1962) 2 S. C. R. 125.

gare is not strictly applied in our country, the power to delegate is not plenary. So for example, the power to repeal an Act is not capable of delegation by the Legislature.

Where legislative powers have been distributed and demarcated specifically as between the Union and the States questions may often arise whether a particular statute transgresses the limits of the legislative powers of the particular law making body. Such transgression may be disguised, covert and indirect and if such be the case the doctrine of colourable legislation will be attracted and the legislation would be struck down as *ultra vires*. Read the cases quoted (h). But a Legislature instead of passing a particular statute can adopt a legislation passed by another State, after, of course, applying its own mind to the subject and the requirement of the adopting State (i).

The distribution of legislative power raises another problem of construction, known as the doctrine of severability. When a law violates one of the Fundamental Rights it is void only to the extent of the violation. When question arises as to whether a Central or State enactment, because of one or more invalid provisions therein, is wholly void the test is whether notwithstanding the invalidity of a part the valid portions of the Act may be held to be good law. The court has to separate the offending provision and declare it to be bad. But where no such separation is possible the entire statute has to be declared as wholly void (j). The rule of severability will not apply therefore to cases where the invalid provisions are essentially and inseparably connected in substance with the valid provisions (k). The test is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive, or whether on a fair review of the whole matter it can be assumed that the Legislature would not have enacted at all that which survives without enacting the part that is *ultra vires* (l).

Patanjali Sastri CJ observed in *State of Madras v. V. G. Row* (m), that in considering the reasonableness of laws imposing restrictions on fundamental rights, the test of reasonableness, whenever prescribed, should be applied to each individual statute impugned and no abstract standard or general pattern of reasonableness can be laid down as applicable to all cases. In *Dr. Khare v. State of Delhi* (n), the Supreme

Reasonableness of restriction on fundamental rights.

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- (h) *K. C. G Narayon Deo v. State of Orissa*, A. I. R. 1954 S. C. 375; *Senapur Tea Co. v. Dy. Commissioner*, A. I. R. 1962 S. C. 137; *Keshavananda v. State of Kerala*, A. I. R. 1973 S. C. 1461.
- (i) *Mithon Lal v. State of Delhi*, A. I. R. 1958 S. C. 682; *Shama Rao v. Union Territory*, A. I. R. 1967 S. C. 1480.
- (j) *Attorney General of Alberta v. A. G of Canada*, 1947 A. C. 502; *State of Bombay v. F. N. Balsara*, 1951 S. C. R. 682; *State of Bombay v. United Motors*, 1953 S. C. R. 1069.
- (k) *Romesh Thapar v. State of Madras*, 1950 S. C. J. 418.
- (l) *State of Bihar v. Kameshwar*, A. I. R. 1952 S. C. 252.
- (m) A. I. R. 1952 S. C. 196.
- (n) A. I. R. 1952 S. C. 211.

Court said further that in considering the reasonableness of such laws both the procedural and substantive aspects of the laws should be examined from the point of view of reasonableness. In order to be reasonable restrictions must not be arbitrary or excessive and the procedure and manner of imposition of the restriction must also be fair and just. Any restriction which is opposed to the fundamental principles of liberty and justice cannot be considered reasonable. Again, one of the important tests is whether the aggrieved party has a right of representation against the restriction imposed or proposed to be imposed (o). If the statute fails to provide sufficient safeguards against its misuse the operative sections will be rendered invalid, *State of M.P. v. Baldeo Prasad* (p). A restriction under sec. 3(1) of the Punjab Special Powers Act, 1956 was struck down by the Supreme Court on the ground that the Act did not provide for any time for operation of an order made thereunder nor for a representation by the aggrieved party (q).

Part XI of the Constitution of India covering Articles 245 to 263 deals with the Legislative and Administrative relations between the Union and the States and we shall confine ourselves to a discussion of Art 252 here.

In order to appreciate the content, scope and meaning of the provisions of Article 252, it is necessary to refer to the scheme of the Constitution. It appears in Part XI headed 'Relations between the Union and the States' and occurs in Chapter I relating to 'Legislative Relations', i.e., dealing with the distribution of legislative powers between the Union and the States. It would appear that our Constitution though broadly federal in structure, is modelled on the British Parliamentary System, with unitary features. Thus, even apart from emergencies, the Parliament may assume legislative power (though temporarily) over any subject under Article 249, by a two thirds vote that such legislation is necessary in 'the national interest'. While a Proclamation of Emergency under Article 352 is in operation, the Parliament is also competent under Article 250 to legislate with respect to any such matter in the State list. Article 251 makes it clear that the legislative power of the State legislatures to make any law which they have power under the Constitution to make, is restricted by the provisions of Articles 249 and 250; but if any law made by the legislature of a State is repugnant to any provision of a law enacted by the Parliament, the law made by Parliament shall prevail and the law made by the State legislature to the extent of repugnancy shall not be valid so long as the law enacted by Parliament is effective and operative.

Scheme of the
Constitution.

Reverting back to Article 252, it will be noticed that this article corresponds to Section 103 of the Government of India Act, 1935. It empowers the Parliament to legislate for two or more States on any of the matters with respect to which it has no power to make laws except as provided in Articles 249 and 250.

(o) *State of Bihar v. K. K. Misra*, 1970 (2) S. C. A. 574.

(p) 1961 1 S. C. R. 970.

(q) *Virendra v. State of Punjab*, A. I. R. 1957 S. C. 896.

The effect of the passing of a resolution under clause (1) of Article 252 is that Parliament, which has no power to legislate with respect to the matter which is the subject of the resolution, becomes entitled to legislate with respect to it. On the other hand the State legislature ceases to have a power to make a law relating to that matter. While Article 263 provides for the creation

of an Inter-State Council for effecting administrative co-ordination between the States in matters of common interest, Article 252 provides the Legislative means to attain that object. After the enactment of a law by the Parliament under this article, it is open to any of the other States to adopt the Act for such State by merely passing a resolution to that effect in its Legislature, but the operation of the Act in such State cannot be from a date earlier than the date of the resolution passed in the Legislature adopting the Act. The question as to whether or not there is surrender by the State Legislature of its power to legislate, and if so, to what extent, must depend on the language of the resolution passed under Article 252 (1), *R. M. D. C. (Mysore) Private Ltd. v. The State of Mysore* (r). Clause (2) specifically lays down that after Parliament makes an Act in pursuance of the resolution, such Act cannot be amended or repealed by the State Legislature even though the matter to which the Act of Parliament relates was included in List II of the Seventh Schedule of the Constitution (s).

It is not possible in the short span of these lectures to give an exhaustive exposition of the different aspects of the Constitutional laws involved and the subject matter of these lectures precludes one from giving a commentary on the Constitution. Excellent treatises and lectures by learned authors and jurists are available for reference and study on the subject. We need only in these lectures, to keep in mind the broad aspects of interpretation and proceed to refer to some conclusions of importance made by the Supreme Court.

As Ayyanger J put it: If a statute is legally enacted in the sense of being within legislative competence of the relevant legislature and is constitutional Articles 32 and 226.

as not violating any fundamental rights, it does not automatically follow that any action taken by quasi-judicial authorities created under it cannot violate fundamental rights guaranteed by Part III of the Constitution. The legislative competence, the existence of which renders the enactment valid, is confined to action, by the authorities created under it, which, on its proper construction, could be taken. If an authority constituted under such a legal and valid enactment oversteps the constitutional limitations on the legislative power of the State Legislature, the acts of such an authority would be plainly unconstitutional and the consequences arising out of unconstitutional State action would necessarily attach to such action. If an "unconstitutional Act" of the State Legislature would invade fundamental rights the same character and the same

(r) 1962 (3) S. C. R. 230, A. I. R. 1962 S. C. 594.

(s) *Union of India v. V. Basavaiah*, A. I. R. 1979 S. C. 1415.

consequence must a fortiori follow when that act is not even by the State Legislature but by an authority constituted under an enactment passed by it. Where State action without legislative sanction behind it would violate the rights guaranteed under Part III the result cannot be different because the State acts through the mechanism of a quasi-judicial authority which is vested with jurisdiction to interpret the enactment. The absence of legislative sanction for the imposition of an obligation or the creation of a liability cannot be filled in by the misinterpretation by an authority created under the Act.

In the same case *Ujjam Bai v. State of U. P.* (t)—Hidayatullah J said: It is clear that laws which do not offend Part III and are not otherwise *ultra vires* are protected from any challenge whether under Article 265 or under the Chapter on Fundamental Rights. Where the laws are *ultra vires* but do not per se offend fundamental rights (to distinguish the two kinds of defects), they are capable of a challenge under Article 265, and the executive action, under Article 32. Where they are *intra vires* otherwise but void being opposed to fundamental rights, they can be challenged under Article 265 and also Article 32.

This position, however, changes radically when the law is valid but the action under it is challenged. The real difference in such cases arises, because the law is not challenged at all. What is challenged is the interpretation of the law by the taxing authorities, and a breach of fundamental rights is said to arise from the wrong interpretation. In considering this matter, several kinds of cases must be noticed.

Where the action of an officer of the State is wholly without jurisdiction (as, for example, when a sales tax officer imposes income tax or *vice versa*, though such things are hardly likely to happen), it can have no support from the law he purports to apply. Cases of jurisdiction thus come within Article 32. Other examples are an attempt to recover a tax twice over, where the first collection is legal, *Tata Iron and Steel Company's case* (u): or acting beyond the period of limitation, *Madanlal Arora v. The Excise and Taxation Officer, Amritsar* (v). In such cases, even if the taxing authority thought on its own understanding of the law that it was acting within its jurisdiction, it would not avail, and the want of jurisdiction, if proved, would attract Article 32. Speaking of such a situation, the order of reference in this case had said:

Action of State Officer
Without Jurisdiction.

“This again is a case in which the authority had no jurisdiction under the Act to take proceedings for assessment of tax, and it makes no difference that such assumption of jurisdiction was based on a misconstruction of statutory provisions”.

The above was said of *Madanlal Arora's case* (supra).

But where the law is made validly and in conformity with the fundamental

(t) 1963 (I) S. C. A. 1.

(u) 1961 (I) S. C. R. 309.

(v) A. I. R. 1961 S. C. 1965.

rights and the officer enforcing it acts with jurisdiction, other considerations arise. If, in the course of his duties, he has to construe provisions of law and miscarries, it gives a right of appeal and revision, where such lie and in other appropriate cases, resort can be had to the provisions of Articles 226 and 227 of the Constitution and the matter brought before this Court by further appeals. This is because every erroneous decision does not give rise to a breach of fundamental rights. Every right of appeal or revision cannot be said to merge in the enforcement of fundamental rights. Such errors can only be corrected by the processes of appeals and revisions. Article 32 does not confer an appellate or revisional jurisdiction on this Court and if the law is valid and the decision with jurisdiction, the protection of Article 265 is not destroyed. There is only one exception to this, and it lies within extremely narrow limits. That exception also bears upon jurisdiction, where by a misconstruction the State Officer or a quasi-judicial tribunal embarks upon an action wholly outside the pail of the law he is enforcing. If in those circumstances, his action constitutes a breach of fundamental rights, then a petition under Article 32 may lie. The cases of this Court in which interference can be sustained on this ground are many; but as examples may be seen the following: *Amar Singh's case* (w), and *Mohanalal Hargovind's case* (x).

But presence of a number of valid rules cannot help to validate an invalid rule (y).

Equality means equality among equals. Excessive reservation for backward communities so as to create monopoly or unduly disturb the legitimate claims of other communities is unconstitutional and invalid (z).

Exemption of Harijans and Muslim inhabitants from levy of cost of additional police force is *ultra vires* Article 15(1) of the Constitution (a).

Classification solely based on caste considerations is a fraud on the Constitution and as such is invalid (b).

Rule of communal rotation for selection of candidates for the public service reserving posts for various communities is *ultra vires*, illegal and void (c).

Discrimination on grounds of descent violates Article 16(2) and is void (d).

Arbitrary ban against re-employment of certain persons under the Government after termination of his service is *ultra vires* Article 16(1) and so void (e).

(w) A. I. R. 1955 S. C. 504.

(x) 1955 (2) S. C. R. 509.

(y) *Pandurangrao v. Andhra Pradesh Public Service Commission*, A. I. R. 1963 S. C. 268.

(z) *T. Devadasan v. Union of India*, A. I. R. 1964 S. C. 179.

(a) *State of Rajasthan v. Tph Pratap Singh* A. I. R. 1960 S. C. 1208.

(b) *M. R. Balaji v. State of Mysore*, A. I. R. 1963 S. C. 649.

(c) *Venkataraman v. State of Madras*, A. I. R. 1951 S. C. 229.

(d) *Gazula A. Rama Rao v. State of Andhra Pradesh*, A. I. R. 1961 S. C. 564.

(e) *Kishan Chand v. Chairman*, A. I. R. 1962 S. C. 602.

Rule prohibiting demonstration altogether by Government servants is invalid and is *ultra vires* Article 19(f).

There is no presumption of constitutionality where the enactment on the face of it violates fundamental right(g). It cannot be re-vitalised by subsequent amendment, *Sagir*, *ibid*.

Government of India cannot revoke grants made by Rulers of acceding States before accession (h).

Where one builds Dharmasala on a land belonging to the State but after obtaining permission, the subsequent dispossession by an executive order is violation of fundamental right (i). But charity created by private individual is not immune from the right of eminent domain(j).

One State collecting Central Sales Tax on behalf of the Central Government and when another threatens to collect Sales tax on behalf of Central Government on the same turnover, it is infringement of fundamental right(k).

It is now well settled as a result of the decisions of the Supreme Court in *E. P. Royappa v. State of Tamil Nadu*(l), and *Maneka Gandhi v. Union of India*(m), that Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. It requires that State action must not be arbitrary but must be based upon some rational and relevant principle which is nondiscriminatory. It Art 14.

must not be guided by an extraneous or irrelevant consideration, because that would be denial of equality. The principle of reasonableness and rationality which is legally and philosophically an essential element of equality or nonarbitrariness is projected by Article 14 and it must characterise every State action, whether it be under authority of law or in exercise of executive power without making of law. The State cannot, therefore, act arbitrarily in entering into relationship, contractual or otherwise, with a third party, but its action must conform to some standard or norm which is rational and nondiscriminatory (n).

Sec 112 of Agra Tenancy & Land Records Act, 1950 where the law allowed the Court of Wards to take over the property of a landlord if the latter habitually infringed the rights of tenants, the Supreme Court struck down the law as void by reason of the fact that it completely negatived the fundamental right under Article 19(1) (f) by making the enjoyment of the right to

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- (f) *O. K. Ghosh v. E. X. Joseph*, A. I. R. 1963 S. C. 812; *Kameshwar v. State of Bihar* A. I. R. 1962 S. C. 1166.
 - (g) *Sagir Ahmed v. State of U. P.* A. I. R. 1954 S. C. 728.
 - (h) *Virendra v. U. P.* A. I. R. 1954 S. C. 447.
 - (i) *Bishan Das v. State of Punjab*, A. I. R. 1961 S. C. 1570.
 - (j) *State of Bihar v. Kameshwar Singh*, A. I. R. 1952 S. C. 252.
 - (k) *Tata Iron and Steel v. S. R. Sircar*, A. I. R. 1961 S. C. 65.
 - (l) A. I. R. 1974 S. C. 555.
 - (m) A. I. R. 1978 S. C. 597.
 - (n) *Ramana v. I. A. Authority*, A. I. R. 1979 S. C. 1628; See also, *Erusian Equipment v. State of West Bengal*, A. I. R. 1975 S. C. 266; *Rasbihari Panda v. State of Orissa*, A. I. R. 1969 S. C. 1081; *C. K. Achitan v. State of Kerala*, A. I. R. 1959 S. C. 490.

depend on the mere discretion of the executive(o). Similarly, certain sections of the Madras Religious and Charitable Endowments Act, 1951 and the Orissa Hindu Religious Endowments Act, 1939 were declared *ultra vires* by the Supreme Court. In the Madras Statute because the provisions were drastic in their character and the worst feature was that there was no access to the Courts and yet it provided that a religious institution could be taken over and vested in an executive officer if he was satisfied that it was not being properly administered (p). In the other case, the Orissa Statute provided for framing of a Scheme not by a civil court but by a Commissioner who is a mere administrative or executive officer and there was no provision for appeal against his order to the Court(q). A law providing reasonable restrictions on the exercise of the rights conferred by Article 19 may contain substantive provisions as well as procedural provisions and the Court has to consider the reasonableness of both (r). A taxing statute was accordingly struck down on the ground that it provided no procedure for assessment of tax, *K. T. Moopil v. State of Kerala* (s), and a provision in Sec 437 of the Calcutta Municipal Act, 1951 was struck down as it provided that the exercise of certain power by the Corporation was conclusive and non-justiciable (t).

While holding that the Parliament was competent to enact the Banking Companies Act 1969 but in so far as the Act prohibited the named Banks from carrying on banking business but allows other than named banks to carry on such business in India and abroad and also allows new banks to be floated for such business the Act makes a hostile discrimination and it there-

fore hits Article 14 of the Constitution. The under-
Banking Company. taking of a Banking Company is property and can be validly acquired but by the method adopted in the Act for valuation of the undertakings of the named banks, important items of assets having been left out and the principles, at least some of them, being irrelevant and not recognised the ultimate result substantially impairs the guarantee of compensation under Article 31(2) and on that account the Act was struck down (u).

The question of permitting slaughter of cows, bulls and bullocks, has for a long time generated violent sentimental differences between sections of the people in our country. Since the commencement of the Constitution the controversy relating to the limits within which restrictions may be imposed upon such slaughter of such cattle was agitated before the Supreme Court

Slaughter of Cow
etc. in *Mohd Hanif Qureshi v. State of Bihar* (v), in which validity of three State Acts of Bihar, U. P., and Berar was challenged and the Court held that—(i) that a

(o) *Thakur Raghubir Singh v. The Court of Wards*, 1953 S. C. R. 1049.

(p) *Commissioner v. Sri Lakshindra Tirtha* 1954 S. C. R. 1005.

(q) *Mahant Sri Jaganath v. State of Orissa*, 1954 S. C. R. 1046.

(r) *N. B. Khare v. State of Delhi*, 1950 S. C. R. 519.

(s) A. I. R. 1961 S. C. 552.

(t) *Corporation of Calcutta v. Calcutta Tramways Co.*, 1965 I-S. C. A. 124.

(u) *R. C. Cooper v. Union of India*, A. I. R. 1970 S. C. 564.

(v) A. I. R. 1958 S. C. 731.

total ban on the slaughter of cows of all ages and calves of cows and of she-buffaloes, male and female, was reasonable and valid; (ii) that a total ban on the slaughter of she-buffaloes or breeding bulls or working bullocks (cattle as well as buffaloes) so long as they were capable of being used as milch or draught cattle was also reasonable and valid; (iii) that a total ban on the slaughter of she-buffaloes, bulls and bullocks (cattle or buffalo after they ceased to be capable of yielding milk or of breeding or working as draught animals) was not in the interest of the general public and was invalid. Later, attempts were made from time to time to circumvent this judgment of the Court and the Legislatures of Bihar, U. P., and Madhya Pradesh enacted the minimum age of animals to be slaughtered. Under the Madhya Pradesh Act slaughter except upon a certificate issued by a competent authority was prohibited and the certificate could not be issued unless the animal was above 20 years of age. The Supreme Court held in the case *Abdul Hakim Qureshi v. Bihar*(w), that the ban on the slaughter of bulls, bullocks and she-buffaloes below the age of 20 or 25 years was not a reasonable restriction in the interest of the general public and therefore was void. Still later, on April 1, 1969 the Supreme Court had to decide another case on the subject, *Mohd Faruk v. Madhya Pradesh* (x). In that case, it appeared that the bye-laws of the Jabalpur Municipality permitted slaughter of bulls and bullocks. A licence had to be obtained for that purpose. Slaughter of animals in places outside the premises fixed by the Municipality was prohibited by sec 257(3) of the Act, and sale of meat within the area of the Municipality of animals not slaughtered in the premises fixed by the Municipality was also prohibited. Under the notification by which the bye-laws were issued in 1948 bulls and bullocks could be slaughtered in premises fixed for the purpose. But by the notification dated January 12, 1967 confirmation of the bye-laws in so far as they related to bulls and bullocks was cancelled. The effect of that notification was to prohibit the slaughter of bulls and bullocks within the municipality of Jabalpur. The Supreme Court held that this cancellation of the confirmation of the Bye-laws imposed a direct restriction upon the petitioner's fundamental rights and accordingly declared it *ultra vires* as infringing Article 19(1)(g) of the Constitution. The Court observed: The sentiments of a section of the people may be hurt by permitting slaughter of bulls and bullocks in premises maintained by a local authority. But a prohibition imposed on the exercise of a fundamental right to carry on an occupation, trade or business will not be regarded as reasonable, if it is imposed not in the interest of the general public, but merely to respect the susceptibilities and sentiments of a section of the people whose way of life, belief or thought is not the same as that of the claimant. This judgment was delivered in April 1969 and ten years later on 22nd April 1979 India's Sarvodaya leader Acharya Binobaji entered into a fast following the failure of his efforts to get cow slaughter totally banned in the country. On an assurance, however, by the Prime Minister the Acharya broke his fast on 26th April and a few weeks

(w) A. I. R. 1961 S. C. 448.

(x) A. I. R. 1970 S. C. 93.

after, on May 18, 1979 a Bill was introduced in the Parliament for inserting a new entry in the Concurrent List of the 7th Sch of the Constitution as "17-C for prohibiting slaughter of cows and calves and other milch and draught cattle" consistent with Article 48 contained in the Directive Principles of the Constitution. This Bill is the 50th Constitution Amendment Bill.

Article 21 speaks of protection of life and personal liberty. It says that no person shall be deprived of his life or personal liberty except according to procedure established by law and Article 22 relates to preventive detention with certain safeguards. The two articles together constitute a distinct code. The earliest case on the subject is *A. K. Gopalan v. State of Madras* (y).

Art 21. In that case the Supreme Court took a very conservative and tradition bound view and held that the freedom of movement assured by Article 19 did not apply to the law of preventive detention. Article 19(1)(d) was different from Article 21 the only object of which, as the learned Judges said, was to prevent the Executive from encroaching upon the personal liberty of a citizen except in accordance with law. Delivering the minority judgment Fazl Ali J said that Article 19(1)(d) controlled Article 21. And with the passage of time there was a gradual development towards a bold approach to the matter disclosing acceptance of the spirit in which Fazl Ali J had expressed himself. Domiciliary visits upon a suspect at his house during night as provided and authorised by Reg 236 of the U. P. Police Regulations were considered as encroachment upon the liberty of a person and the Regulation was declared as unconstitutional being violative of Articles 19(1) and 21 of the Constitution (z). In the well-known Passport case, arising out of a decision of the Bombay High Court, the Supreme Court said that the right to travel abroad was a fundamental right and so refusal or withdrawal of passport based on arbitrary executive instructions violated Articles 21 and 14(a). In *Gopalan's* case Mukherjea J had said that 'the right to the safety of one's life and limbs and to enjoyment of personal liberty, in the sense of freedom from physical restraint and coercion of any sort, are the inherent birth rights of any man' and that the preventive detention is not a punitive measure. Rather it is a precautionary measure in order to prevent a person from doing something. But as Ramaswami J observed the procedural requirements of Article 22 are mandatory in character and even if one of the procedural requirements is not complied with the order of detention would be rendered illegal and with these observations the Supreme Court released the petitioner in *Sk Abdul Karim v. State of West Bengal* (b), declaring that the order of detention was illegal and *ultra vires*. Where there was inexcusable delay in considering the representation of the detained person the detention would be considered illegal too (c). Similar would be the position where the order confirming detention was taken

(y) A. I. R. 1950 S. C. 27.

(z) *Kharak Singh v. State of U. P.* A. I. R. 1963 S.C. 1295.

(a) *Satwant Singh v. Asstt Passport Officer, Bombay*, A. I. R. 1967 S. C. 1836.

(b) A. I. R. 1969 S. C. 1028.

(c) *Baidyanath v. State of West Bengal*, A. I. R. 1972. S. C. 1198.

three days after the expiry of detention for three months(d). Irrelevant or vague grounds of detention would make the order of detention void *ab initio* (e). The detention order must be proper on the face of it and if there is any improper motive behind it or there is misuse or abuse of power due to breach of any law or bad faith the detention would be illegal and the detenu would be released(f). A detention order would be illegal when the Government does not consider the representation of the detenu at all(g).

The "grounds" in Art. 22(5) do not mean mere factual inferences but mean factual inferences *plus* factual materials which led to the factual inferences. The grounds must be self-sufficient and self-explanatory (g-1) and the opportunity to be given to the detenu for being heard by the Advisory Board must not be illusory but it must be real (g-2).

The minority competent to claim protection under Article 30(1) and on that account the privilege of establishing and maintaining educational institutions of its choice must be a minority of persons residing in India. It does not confer upon foreigners not resident in India the right to set up educational institutions of their choice. Persons setting up educational institutions must be resident in India and they must form a well-defined religious or linguistic minority. It is not however predicated that protection of the right guaranteed under Article 30 may be availed only in respect of an institution established before the Constitution by persons born and resident in British India. By Article 29(1) any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same and clause (2) guarantees that no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them. The protection of the rights under Article 29 may be claimed only by Indian citizens. Article 30 does not expressly refer to citizenship as a qualification for the members of the minorities. Therefore, the guarantee of protection under Article 30 is not restricted to educational institutions established after the Constitution. Institutions which had been established before the Constitution and continued to be administered by minorities, either based on religion or language qualify for the protection of the right of minorities declared by Article 30(h). In laying down the above law the

(d) *Shibapada v. State of West Bengal*, A. I. R. 1972 S. C. 1356.

(e) *Dwarka Das v. State of J and K*, 1956, S. C. 498; *Pushkar v. State of West Bengal*, A. I. R. 1970 S. C. 852; *Mohd Yusuf v. State of J and K*, A. I. R. 1979 S. C. 1925.

(f) *Rammonohar Lohia v. State of Bihar*, A. I. R. 1966 S. C. 740.

(g) *Pankaj v. State of West Bengal*, A. I. R. 1970 S. C. 97.

(g-1) *Salini Soni v. Union of India*, A. I. R. 1981 S. C. 431; following *Icehur Devi v. Union of India*, A. I. R. 1980 S. C. 1983 and *Ganga Ramchand v. Union of India*, A. I. R. 1980 S. C. 1744.

(g-2) *Hamida Sarforoz v. M. S. Kossbekor*, A. I. R. 1981, S. C. 459.

(h) *Bishop S. K. Patro v. State of Bihar*, A. I. R. 1970 S. C. 259.

Supreme Court relied upon what was stated earlier by it in the reference, *In Kerela Education Bill*: There is no reason why the benefit of Article 30(1) should be limited only to educational institutions established after the commencement of the Constitution. The language employed in Article 30(1) is wide enough to cover both pre-Constitution and post-Constitution institutions. It must not be overlooked that Article 30(1) gives the minorities two rights, namely, (a) to establish and (b) to administer educational institutions of their choice just as *Hidayatullah C. J.* said, these are the fundamental rights of the minorities, whether based on religion or language and the two rights are only separated in point of time. It matters not if a single philanthropic individual with his own means founds the institution or the community at large contributes the funds. It is equally irrelevant that in addition to the minority community others from other minority communities or even from the majority community can take advantage of these institutions. Such other communities bring income and they do not have to be turned away to enjoy the protection. The next part of the right relates to the administration of such institutions. The State has, however, the right to make regulations relating to standards of education, conditions of employment of teachers and the health and hygiene of students although they may indirectly affect it. While the management must be left to them, they may be compelled to keep in step with others. The rights need not be enlarged nor whittled down. And so when the Kerala University Act, 1969 came to be examined by the Supreme Court in *State of Kerela v. Mother Provincial*, it struck down several of its provisions as *ultra vires* of Article 30 of the Constitution, as they were found, inter alia, to associate nominated members with the other members of the governing body, take away the disciplinary action from the governing body and the managing council, enabled political parties to come into the picture of the administration on minority institutions which may not like this interference and introduce elaborate procedure for management in which even the governing body or the managing council have no say⁽ⁱ⁾.

Article 30(1) thus gives two rights to the minorities, (a) to establish and (b) to administer educational institutions of their choice. The right to administer cannot obviously include the right to maladminister. Unlike Article 19(1) the fundamental freedom under Article 30(1) is absolute in terms; it is not made subject to any reasonable restrictions of the nature the fundamental freedoms enunciated in Article 19 may be subjected to. All minorities linguistic or religious, have by Art 30(1) an absolute right to establish and administer educational institutions of their choice and any law or executive direction which seeks to infringe the substance of that right under Article 30(1) would to that extent be void. But as S. R. Das C.J. said in the *Kerela Education Bill, 1957* case^(j), "the minority cannot surely ask for aid or recognition for an educational institution run by them in unhealthy surroundings, without any competent teachers possessing any semblance of

(i) A. I. R. 1970 S. C. 2079.

(j) A. I. R. 1958 S. C. 956.

qualification, and which does not maintain even a fair standard of teaching or which teaches matters subversive of the welfare of the scholar. It stands to reason, then, that the constitutional right to administer an educational institution of their choice does not necessarily militate against the claim of the State to insist that in order to grant aid the State may prescribe reasonable regulations to ensure the excellence of the institutions to be aided.” Accordingly, the Supreme Court in a later case *Rev Sidhajibhai v. State of Gujarat* (k), negatived an argument advanced by the State that a law could not be deemed to be unreasonable unless it was totally destructive of or annihilative of the right under Article 30(1) and said that regulation made in the true interests of efficiency of instruction, discipline, health, sanitation, morality, public order and the like may undoubtedly be imposed. Such regulations are not restrictions on the substance of the right which is guaranteed; they secure the proper functioning of the institution, in matters educational. Regulations must satisfy a dual test—the test of reasonableness and the test that it is regulative of the educational character of the institution and is conducive to making the institution an effective vehicle of education for the minority community or other persons who resort to it. The right established by Article 30(1) is not to be whittled down by so-called regulative measures conceived in the interest not of the minority educational institution, but of the public or the nation as a whole. If every order which while maintaining the formal character of a minority institution destroys the power of administration is held justifiable because it is in the public or national interests, though not in its interest as an educational institution, the right guaranteed by this Article will be but a teasing illusion, a promise of unreality.

Administration means management of the affairs on the institution as was observed by the Supreme Court in the other case, *State of Kerala v. Rev Mother Provincial* (l). This management must be free of control so that the founders or their nominees can mould the institution as they think fit and in accordance with their ideas of how the interests of the Community in general and the institution in particular will be best served. No part of this management can be taken away and vested in another body without an encroachment upon the guaranteed right. But at the same time the minority institutions cannot be allowed to fall below the standards of excellence expected of educational institutions, or under the guise of exclusive right of management to decline to follow the general pattern. While the management must be left to them, they may be compelled to keep in step with others. Article 30(1) is not a charter for maladministration.

Correctly, therefore, the Calcutta High Court held that the supersession of a managing committee and the appointment of an Administrator would go far beyond the permissible limits of regulation as interpreted by the various decisions of the Supreme Court. Similarly, the unilateral revision of the Special constitution by the Board without any application on behalf of the

(k) A. I. R. 1963 S. C. 540.

(l) A. I. R. 1970 S. C. 2079.

school or society maintaining it and without any reference to it is not only completely contrary to all known canons of justice and fairplay, but it is also violative of article 30(1) of the Constitution (m).

The Supreme Court, therefore, did not hesitate to strike down clauses (a) and (b) of Sec 51A of the Gujarat University Act, 1949 as violative of Article 30(1) as it enacted that no member of the teaching and non-teaching staff of an affiliated college shall be dismissed, removed or reduced in rank except after an inquiry in accordance with the procedure prescribed in clause (a) and the penalty to be inflicted on him is approved by the Vice-Chancellor or his nominee and Clause (b) required that such termination should be approved by the Vice-Chancellor or any officer authorised by the Vice-Chancellor in this behalf. The power thus conferred upon the Vice-Chancellor was unlimited and undefined. It was not a regulatory measure but an arbitrary power conferred upon him. It was bad because it acted as a check on administration. Further, to confer arbitrary power on the Vice-Chancellor could be abused and he could even withhold his approval. An uncanalised power without any guideline to withhold approval would be a direct abridgement of the right of the management to dismiss or remove a teacher or inflict any other penalty after conducting an enquiry (n).

Similarly, the right of appeal conferred upon the Vice-Chancellor by Ordinance 33(4), Chapter LVII of the Ordinance framed by the Syndicate of the Kerala University under Sec 19(J) of the Kerala University Act, 1969 was held by the Supreme Court in the case *Lilly Kurian v. Sr Lewina(o)*, as a grave encroachment upon the right to enforce and ensure discipline in the administrative affairs of St Joseph's Training College for Women, Ernakulam, being uncanalised and unguided in the sense that no restrictions were placed on the exercise of the power. The grounds on which the Vice-Chancellor could interfere in such appeals were not defined. He may not only set aside an order of dismissal of a teacher and order his reinstatement but may also interfere with punishments. It was a blanket power. It was violative of Article 30(1) and had the effect of destroying the minority institution's disciplinary control over the staff of the College and therefore it would not apply to such an institution. In coming to this conclusion the Supreme Court fully relied upon its earlier decision in the *St Xaviers College v. State of Gujarat (p)*.

The Kerala University Act, 1969 has been repealed by the Kerala University Act, 1974 and the new Act has made provision for empowering the Government to constitute an Appellate Tribunal for hearing appeals from teachers aggrieved by disciplinary action taken against them and the Tribunal would pass orders as it deemed fit including order of reinstatement of the teacher concerned but as the question of validity of such provisions as in the 1974 Act was not in question in the case under consideration the Supreme

(m) *N. R. Iyer Memorial v. State of West Bengal* 85 CWN at p. 119.

(n) *St Xaviers College v. State of Gujarat*, A. I. R. 1974 S. C. 1389.

(o) A. I. R. 1979 S. C. 52.

(p) A. I. R. 1974 S. C. 1389.

rightly refrained from expressing any opinion in regard thereto. It should, however, be pointed out that Mathew J of the Supreme Court in *St Xaviers'* case had rightly observed that the relationship between the management and a teacher was that of an employer and employee and it passes one's understanding why the management cannot terminate the services of a teacher on the basis of the contract of employment. The learned Judge continued: "Of course, it is open to the State in the exercise of its regulatory power to require that before the services of a teacher are terminated, he should be given an opportunity of being heard in his defence." That would hardly justify investing a third power or forum with power to review or set aside an order of dismissal, removal or reduction in rank upon a teacher and thus thrust an unwilling and undesirable person upon the institution. A Civil Court cannot even pass an order or decree for reinstatement of a dismissed teacher. It can only pass a decree for compensation for wrongful dismissal. The provisions referred to in the Kerala University Act, 1974 is, in the circumstances, of doubtful validity keeping the contents of the rights covered by Article 30(1) of the Constitution in mind.

Articles 352 to Article 360 relate to the Emergency Provisions in the Constitution of India. If the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened whenever by war or external aggression or internal disturbance, he may by proclamation, make a declaration to that effect, in respect of the whole of India or of such part thereof as may be specified in the Proclamation. Such Proclamation may be declared even before the actual occurrence of war or of any such aggression or disturbance if the President is satisfied that there is imminent danger thereof. The President may also by a Proclamation assume to himself all, or any of the functions of the Government of a State and declare that the powers of the legislature of the State shall be exercisable by or under the authority of the Parliament if he is satisfied that there is failure of Constitutional machinery in that State. During the pendency of the Proclamation of emergency the provisions in respect of the fundamental rights in Article 19 may be suspended. Article 359 lays down that where a proclamation of emergency is in operation, the President may by order declare that the right to move any Court for the enforcement of such of the rights conferred by Part III of the Constitution as may be mentioned in the Order and all proceedings pending in any Court for the enforcement of the rights so mentioned shall remain suspended for the period during which the proclamation is in force. Article 360 makes provisions as to financial emergency. It will be outside the scope of this lecture to recount the details of the different provisions contained in the various Articles which cover the emergency provisions in the Constitution but it is important to note that by the Constitution (38th Amendment) Act, 1975 it was declared that the satisfaction of the President was final and conclusive and shall not be questioned in any Court on any ground. In other words, the Proclamation is immune from judicial review.

Emergency and
Ultra Vires.

Since independence we had to pass through a few spells of emergency periods and the country had felt the impact of declaration of such Proclamation. In October 1962, China made an invasion upon India's territory and so the President had to declare an emergency and make the Proclamation and the Parliament passed the Defence of India Act, 1963 which has since been consolidated into Defence of India and Internal Security Act, 1971. Shortly after the end of the Chinese Conflict India had to face war within Pakistan in 1965 followed by another Indo-Pakistan conflict in 1971 which culminated in the birth of what is now called Bangladesh. Again in the first half of 1975 internal disturbances of considerable magnitude appeared in the country and in June of that year a Proclamation of Emergency was clamped upon the country and it remained in force for a few months short of two years.

During emergency the President may by Order, under Article 359, suspend Article 19, 14, 21 and 22 of the Constitution including suspending the right to move any Court for enforcement of any of the fundamental rights specified in such Order, including the right to move the High Court for a writ of *habeas corpus* under Sec 491 Cr. P. Code (since repealed). Gajendragadkar J of the Supreme Court said in the case *Makhan Singh v. State of Punjab*(q), that Article 359(1) and the Presidential Order issued under it might constitute a sort of moratorium or a blanket law against the institution or continuance of any legal proceedings and under Article 358 the suspension of Article 19 is complete. That being so legislature and executive action contravening Article 19, during the period of emergency, cannot be questioned even after the emergency is over. But in an earlier case *Mohan Chowdhury v. Chief Commissioner, Tripura* (r), it was held that a detinue may challenge in Court his detention but it must not be on the ground of contravention of any of the fundamental rights suspended in the Order of the Proclamation. Such challenge may be directed as being *malafide* or *ultra vires* of some statutory provisions, *Ram Monohar v. State of Bihar* (s), *Durgadas v. Union of India* (t), *Meenakshi Mills v. Union of India* (u). The observation of Subba Rao CJ in *Ghulam Sarwar v. Union of India* (v), that an order making an unjustified discrimination in suspending the right to move a Court under Article 14 itself will be void at its inception lost its significance when that decision was overruled by the Supreme Court in *Md. Jakub v. State of Jammu and Kashmir*(w), where the Court held that there was nothing in Article 359 which could in any way limit the power of the President to suspend the enforcement of any of the fundamental rights and there was no scope for the distinction of one fundamental right from another. In 1976 the position was carried to the extreme in the case *A. D. N. Jabalpur v.*

(q) A. I. R. 1964 S. C. 381.

(r) A. I. R. 1964 S. C. 173.

(s) A. I. R. 1966 S. C. 740.

(t) A. I. R. 1966 S. C. 1078.

(u) A. I. R. 1974 S. C. 366.

(v) A. I. R. 1967 S. C. 1335.

(w) A. I. R. 1968 S. C. 765.

S. Shukla(x), which came up before the Supreme Court during the period the emergency arising out of the internal disturbance was in force. In that case the Supreme Court held (Khanna J dissenting) that in view of the Presidential Order of 1975 no person had even any locus standi to move any High Court under Article 226 for any Writ in order to challenge the legality of a detention order on the ground that it was illegal or was in violation of a statutory provision or was vitiated by malafides or on extraneous consideration. The Court took the view that Article 21 was the sole repository of the rights to life and personal liberty against the State. Khanna J, however, said in his dissenting judgment that the Presidential Order under Article 359(1) cannot have the effect of suspending the right to enforce rights flowing from statutes, nor can it bar access to the courts of persons seeking redress on the score of contravention of statutory provisions. Statutory provisions are enacted to be complied with and it is not permissible to contravene them. The majority decision in *Shukla's* case has been described by some commentators as a fatal blow to the earlier decisions of the Supreme Court and others have described it as 'startling and strikes at the very foundation of administrative law in India'. The Bombay High Court was correct when in *K. M. Ghatage v. Union of India*(y), it accepted the contention that personal liberty was a common law right existing even prior to the commencement of the Constitution and it was not absorbed in Article 21. Prof. M. P. Jain in his 'Indian Constitutional Law' (3rd Ed) has very aptly said that Article 21 has become a liability rather than an asset and perhaps the position of the individual may be better off if Article 21 were to be repealed. In normal times Article 21 affords no protection against legislative action.

Articles 31, 31A and 31B of the Constitution deal with the right to property. The Parliament, however, amended these articles from time to time in the light of the difficulties experienced in the implementation of the policy laid down by the original articles, because of several judicial decisions and to save and validate certain laws which had been passed by the State Legislatures.

Right to Property
Under the Constitution:

Art 31(1) provides that no person shall be deprived of his property save by authority of law, which means that it is consistent with the Right to Property as a fundamental right. Art 19(1) (f) has dealt with one aspect of this right when it guarantees to every citizen the right to acquire, hold and dispose of property, subject to the provision of Art 19(5). The other separate and distinctly different aspects of the said right is the subject matter of the provisions contained in Arts 31, 31A and 31B. There is no overlapping or correlation between the area of these groups of Articles.

Art 31(2) provides for the compulsory acquisition or requisition of private property subject to two conditions precedent. First, the acquisition or requisition must be for a public purpose and must be made in accordance with the provisions of law. Secondly, the law must provide for com-

(x) A. I. R. 1976 S. C. 1207.

(y) A. I. R. 1975 Bom. 324.

compensation for the property so acquired or requisitioned, or lay down principles in that behalf.

Art 31(2A) deals with cases where the relevant law does not provide for the transfer of the ownership or right to possession of any property to the State or to a corporation owned or controlled by the State and it lays down that, in such cases, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property, notwithstanding that it deprives any person of his property.

Art 31A(1) purports to save certain laws, which provide for acquisition of estates, falling under categories (a) to (e) of the said Article and in substance says that laws falling under the said categories shall not be deemed to be void on the ground that they are inconsistent with or take away or abridge any of the rights conferred by Arts 14, 19 or 31. Such laws when passed by the State Legislature must receive the assent of the President.

Art 31B purports to validate certain Acts and Regulations which had been struck down by judicial decisions and these are specified in the 9th Schedule to the Constitution which was inserted by Sec 14 of the Constitution (First Amendment) Act.

The word 'compensation' used in Art 31(2) has been the subject matter of judicial decisions which, in turn, led to the Constitution (Fourth) Amendment Act. The constitutional provisions for property and for payment of compensation upon acquisition have been the battle ground for legislators and jurists, judges and lawyers for arriving at a correct posture on the rights of the people and the State. The scope of controversy has been narrowed down by Constitutional amendments and judicial precedents. Chinnappa Reddy J of the Supreme Court while delivering the Court's judgment in *Oriental Gas Co Ltd. v. State of West Bengal*(z) has referred to these legal battles. I quote the relevant portions from that judgment which was delivered by Reddy J (sitting with four other learned judges):

A resume of constitutional history and the story of the dingdong legal battles that were fought may not be out of place here. It may help us to understand and to appreciate the relevance or irrelevance of the principle specified for determining compensation. Clauses (1) and (2) of article 31 of the Constitution, as they stood originally, were as follows:—

"31. Compulsory acquisition of property:- (1) No person shall be deprived of his property save by authority of law. (2) No property, movable or immovable including any interest in, or in any company owning any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provided for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which the compensation is to be determined and given."

The word 'compensation' occurring in Article 31(2) was not qualified

(z) A. I. R. 1979 S. C. 248.

by any adjective such as 'just' or 'fair' unlike section 51 of the Commonwealth of Australia Constitution Act and the 5th Amendment to the Constitution of America, in both of which provisions, the qualifying adjective 'just' is used. Even so, in *Bela Banerjee's* case (a) the Supreme Court introduced the concept of a 'just equivalent' and held that compensation meant a just equivalent of what the owner had been deprived of'. It was said that the principles to be laid down by the legislature to determine the compensation were subject to the 'basic requirement of full indemnification of the expropriated owner'. If the principles did not take into account 'all the elements which make up the true values of the property appropriated' the legislation was liable to be struck down. In other words, what was to be given was full compensation on the basis of the market value of the property acquired. The decision was capable of creating great difficulty in the sense of discomfiting legislation for the taking over of big estates and the nationalisation of large industrial undertakings. In the words of Shah, J. in *State of Gujrat v. Shantilal Mangaldas* the decisions in *Bela Banerjee's* case and *Subodh Gopal Bose's* case (b)

"... were therefore likely to give rise to formidable problems, when the principles specified by the Legislature as well as the amounts determined by the application of those principles, were declared justiciable. By qualifying 'equivalent' by the adjective 'just', the enquiry was made more controversial; and apart from the practical difficulties, the law declared by this Court also placed serious obstacles in giving effect to the directive principles of State policy incorporated in Art 39".

So it was that Article 31 was amended by the Constitution 4th Amendment Act in 1955. The second clause of Article 31 as amended by the Constitution 4th Amendment Act was as follows:

"No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which, and the manner in which the compensation is to be determined and given and no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate.

The true effect of the amendment was that the adequacy of the compensation provided by the law was made non-justiciable. Again in the words of Shah J in *Shantilal's* case: "A challenge to a statute that the principles specified by it do not award a just equivalent will be in clear violation of the constitutional declaration that the inadequacy of the compensation provided is not justiciable." The intended effect of the amendment had, however, been previously nullified to a large extent by the decisions in *Vajravelu Mudaliar v Special Deputy Collector, Madras* and the *Union of India v Metal*

(a) 1954 S. C. R. 558 ; A. I. R. 1954 S. C. 170.

(b) (1969) 3 S. C. R. 341; A. I. R. 1969 S. C. 634; A. I. R. 1954 S. C. 170; 1954 S. C. R. 587; A. I. R. 1954 S. C. 92.

Corpn of India Ltd.(c) where it was reiterated that the word 'Compensation' signified a 'just equivalent' of what the owner had been deprived of.

In *Vajravelu's case*(d) it was observed:

"The fact that Parliament used the same expressions, namely "compensation" and "principles" as were found in Art 31 before the Amendment is a clear indication that it accepted the meaning given by this Court to those expressions in *Mrs Bela Banerjee's case*(e). It follows that a Legislature in making a law of acquisition or requisition shall provide for a just equivalent of what the owner has been deprived of and specify the principles for the purpose of ascertaining the 'just equivalent' of what the owner has been deprived of. If Parliament intended to enable a Legislature to make such a law without providing for compensation so defined, it would have used other expressions like 'price', 'consideration' etc."

Having said that, Subba Rao, J however, went on to say that the argument that because the word compensation meant 'just equivalent' for the property acquired, therefore the court could ascertain whether it was a 'just equivalent' that would render the amendment of the Constitution nugatory. He observed that neither the principles prescribing the 'just equivalent' nor the 'just equivalent' could be questioned by the court on the ground of the inadequacy of the compensation fixed or arrived at by the working of the principles. The matter was illustrated by the statement that the value of a house which was acquired could be fixed in many ways: estimate by an Engineer, value reflected by comparable sales, capitalisation of rent etc. The application of different principles might lead to different results. No one could insist that only those principles which yielded the highest result should be adopted. On the other hand the value of land acquired in 1950 could not be fixed on the basis of its value in 1930 or though 100 acres were acquired compensation would be given only for 50 acres. Principles so fixing the compensation would be irrelevant. Subba Rao J summarised the position thus (at page 629 of SCR): (at p 1025 of AIR).

"If the legislature makes a law for acquiring a property by providing for an illusory compensation or by indicating the principle for ascertaining the compensation which do not relate to the property acquired or to the value of such property at or within a reasonable proximity of the date of acquisition or the principles are so designed and so arbitrary that they do not provide for compensation at all, one can easily hold that the Legislature made *the law in fraud of its powers*. Briefly stated the legal position is as follows: If the question pertains to adequacy of compensation, it is not justiciable; if the compensation fixed or the principles evolved for fixing it disclose that the legislature made the law in fraud of its powers in the sense we have explained, the question is within the jurisdiction of the court."

(c) (1965) 1 S. C. A. 614 : A. I. R. 1965 S. C. 1017; (1967) 1 S. C. R. 255: A.I. R. 1967 S. C. 637.

(d) A. I. R. 1965 S. C. 1017

(e) A. I. R. 1954 S. C. 170.

In *Vajravelu's* case(f) the compensation to be paid was the value of the land at the date of the publication of the notification under the Land Acquisition Act or an amount equal to the average market value of the land during the five years immediately preceding such date, whichever was less. It was also provided that compensation was to be determined on the basis of the use to which the land was actually put on the date of publication of the notification and not on the basis of any potential value of the acquired land. This court held that in the context of continuous rise of land prices owing to abnormal circumstances it could not be said that the fixation of average price during the preceding five years was not relevant principle for ascertaining the value of the land on or about the date of acquisition. It was also held that though the potential value of the acquired land was generally an element to be considered in valuing land, the exclusion of such an element from consideration merely related to inadequacy of the compensation and did not constitute a fraud on power so as to invalidate the provision. The decision amounted to this that while the principle specified should aim at the ascertainment of a just equivalent, the principles so aimed at could not be said to be irrelevant merely because the application of some other principles might have yielded results more favourable to the owner of the acquired property.

In the case of *Metal Corporation of India*(g) Subba Rao J observed: "The law to justify itself has to provide for the payment of a 'just equivalent' to the land acquired or lay down principles which will lead to that result. If the principles laid down are relevant to the fixation of compensation and are not arbitrary, the adequacy of the resultant product cannot be called in question in a court of law. The validity of the principles, judged by the above tests, falls within judicial scrutiny and if they stand the tests, the adequacy of the product falls outside its jurisdiction." Judging by those tests, the two principles specified for the award of compensation in the Act impugned in that case, namely (i) compensation equated to the cost price in the case of unused machinery in good condition, and (ii) written down value as understood in the I. T. law as the value of used machinery were held to be irrelevant to the fixation of the value of the machinery on the date of acquisition.

The case of *Vajravelu* (h) and *Metal Corporation of India* (i) were both considered in great detail in *Shantilal's* case. The decision in the case of *Metal Corporation of India* was expressly overruled and the two principles which were found to be irrelevant in *Metal Corporation of India's* case were held to be relevant principles for determination of compensation. The observation in *Vajravelu's* case suggesting that compensation meant a 'just equivalent' and that the principles to be specified must relate to ascertainment of a 'just equivalent' were held to be *obiter*. The effect of the

(f) A. I. R. 1965 S. C. 1017.

(g) A. I. R. 1967 S. C. 637.

(h) A. I. R. 1965 S. C. 1017.

(i) A. I. R. 1967 S. C. 637.

amendment of Art 31(2) made by the Constitution 4th amendment Act 1955 was stated to be as follows:

"It clearly follows from the term of Art 31(2) as amended that the amount of compensation payable, if fixed by the Legislature is not justiciable, because the challenge in such a case, apart from a plea of abuse of legislative power, would be only a challenge to the adequacy of compensation. If compensation fixed by the Legislature and by the use of the expression 'compensation' we mean what the Legislature justly regards as proper and fair recompense for compulsory expropriation of property and not something which by abuse of legislative power though called compensation is not a recompense at all or is something illusory is not justiciable on the plea that it is not a just equivalent of the property compulsorily acquired, is it open to the court to enter upon an enquiry whether the principles which are specified by the Legislature for determining compensation do not award to the expropriated owner a just equivalent? In our view, such an enquiry is not open to the Courts under the statutes enacted after the amendments made in the Constitution by the Constitution (Fourth Amendment) Act. If the quantum of compensation fixed by the Legislature is not liable to be canvassed before the Court on the ground that it is not a just equivalent, the principles specified for determination of compensation will also not be open to challenge on the plea that the compensation determined by the application of those principles is not a just equivalent. The right declared by the constitution guarantees that compensation shall be given before a person is compulsorily expropriated of his property for a public purpose. What is fixed as compensation by statute, or by the application of principles specified for determination of compensation is guaranteed: it does not mean however that something fixed or determined by the application of specified principles which is illusory or can in no sense be regarded as compensation must be upheld by the courts, for, to do so, would be to grant a charter of arbitrariness, and permit a device to defeat the constitutional guarantee. But compensation fixed or determined on principles specified by the Legislature cannot be permitted to be challenged on the somewhat indefinite plea that it is not a just or fair equivalent. Principles may be challenged on the ground that they are irrelevant to the determination of compensation, but not on the plea that what is awarded as a result of the application of those principles is not just or fair compensation. A challenge to a statute that the principles specified by it do not award a just equivalent will be in clear violation of the constitutional declaration that inadequacy of compensation provided is not justiciable."

After *Shantilal's* case(j) the effect of the amendment of Art 31(2) by the Constitution 4th Amendment Act again fell to be considered by this court in *R. C. Cooper v Union of India*(k) a decision of the full court. There is a

(j) A. I. R. 1969 S. C. 634.

(k) (1970) 3 S. C. R. 530: A. I. R. 1970 S. C. 564.

controversy whether this case was a retreat from the position taken in *Shantilal's* case. Later in *Keshavananda Bharati's* case^(l) Shelat, Hegde, Grover, Jaganmohan Reddy and Mukherjea JJ expressed the view that *Shantilal's* case was in substance overruled by *Cooper's* case. This uncertainty which is said to have resulted from the decision in *Cooper's* case led to the 25th Amendment of the Constitution. As a result of the 25th Amendment Art 31(2) came to read as follows:

"31 (2) No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for acquisition or requisitioning of the property for an amount which may be fixed by such law or which may be determined in accordance with such principles and given in such manner as may be specified in such law and no such law shall be called in question in any court on the ground that the amount so fixed or determined is not adequate or that the whole or any part of such amount is to be given otherwise than in cash:

Provided that in making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in Cl (1) of Art 30, the State shall ensure that the amount fixed or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause".

So much for constitutional history. We are not concerned in this case with the 25th Amendment. We are concerned with Art 31 (2) as it stood after the 4th Amendment and before the 25th Amendment. On a question of interpretation of Art 31(2) the decision in *Cooper's* case^(m) therefore, has the final word. In *Cooper's* case Shah, J. who spoke for the court recognised the apparently conflicting views expressed in *Vajravelu's* case⁽ⁿ⁾ and *Shantilal's* case but held, that both the lines of thought converged in the ultimate result that the principles of compensation were beyond the pale of challenge, if they were relevant to the determination of compensation and were recognised principles for application in the determination of compensation for property compulsorily acquired and if the principles were of the class of property sought to be acquired. The provisions of the Banking Companies (Acquisition and Transfer of Undertakings) Act 22 of 1969 were struck down on the ground that relevant principles were not specified for the determination of compensation. Instead of providing for valuing the entire undertaking as a unit, the Act provided for determining the value, reduced by the liabilities, of only some of the components which constituted the undertaking. It also provided for different methods of determining compensation in respect of different components. Since the undertaking was sought to be acquired as a going concern the goodwill and the value of the un-expired long term leases had also to be included in the assets of the banks. These important

(l) (1973) Suppl. S. C. R. 1 : A. I. R. 1973 S. C. 1461.

(m) A. I. R. 1970 S. C. 564.

(n) A. I. R. 1965 S. C. 1017.

components of the undertaking were excluded. It was, therefore, held that the principles specified were irrelevant for the determination of compensation of Banking Companies. The court, however, observed that the science of valuation of property recognised several principles or methods for determining the value to be paid as compensation to the owner for loss of his property and that if an appropriate method on principle for determination of compensation was applied, the fact that by the application of another principle which was also appropriate, a different value was reached, would not justify the court in entertaining the contention that out of the two appropriate methods, one more generous to the owner should have been applied by the Legislature. It was observed that if several principles were appropriate and one was selected for determination of the value of the property to be acquired, selection of that principle to the exclusion of other principles was not open to challenge since the selection had to be left to the wisdom of the Parliament. The court then went on to refer to some of the important methods of determination of compensation, and observed (at pp 600 and 601 of SCR): (at pp 609-610 of AIR).

“The important methods of determination of compensation are—
(i) market value determined from sales of comparable properties, proximate in time to the date of acquisition, similarly situate, and possessing the same or similar advantages and subject to the same or similar disadvantages. Market value is the price the property may fetch in the open market if sold by a willing seller unaffected by the special needs of a particular purchaser;
(ii) capitalization of the net annual profit out of the property at a rate equal in normal cases to the return from gilt-edged securities. Ordinarily value of the property may be determined by capitalizing the net annual value obtainable in the market at the date of the notice of acquisition;
Methods of determining compensation (iii) where the property is a house, expenditure likely to be incurred for constructing a similar house, and reduced by the depreciation for the number of years since it was constructed; (iv) principle of reinstatement where it is satisfactorily established that reinstatement in some other place is *bona fide* intended, there being no general market for the property for the purpose for which it is devoted (the purpose being a public purpose) and would have continued to be devoted, but for compulsory acquisition. Here compensation will be assessed on the basis of reasonable cost of reinstatement: (v) when the property has outgrown its utility and it is reasonably incapable of economic use, it may be valued as land plus the break-up value of the structure. But the fact that the acquirer does not intend to use the property for which it is used at the time of acquisition and desires to demolish it or use it for other purpose is irrelevant and (vi) the property to be acquired has ordinarily to be valued as a unit. Normally an aggregate of the value of different components will not be the value of the unit.

These are, however, not the only methods. The method of determining the value of property by the application of an appropriate multiplier to the net annual income or profit is a satisfactory method of valuation of lands

with buildings, only if the land is fully developed, i.e. it has been put to full use legally permissible and economically justifiable and the income out of the property is the normal commercial and not a controlled return, or a return depreciated on account of special circumstances. If the property is not fully developed or the return is not commercial the method may yield a misleading result. But when an undertaking is acquired as a unit the principles for determination are also appropriate to the acquisition of the entire undertaking. In determining the appropriate rate of the profits the return from gilt-edged securities may, unless it is otherwise found unsuitable, be adopted".

It is worthy of notice that Shah, J. very carefully refrained, throughout the discussion, from using the expression 'just compensation' or 'just equivalent' nor did he draw inspiration from any American or Australian case. Realising the implication of the use of adjective like 'just' or 'fair', he was content to the use of expression 'compensation' and to say that the principle specified must be relevant for determination of compensation.

Dealing with the question whether compensation might be provided in the form of bonds, the court said (at page 608-609 of SCR): (at pp 614-615 of AIR).

"Compensation may be provided under a statute, otherwise than in the form of money: it may be given as equivalent of money, i.e. a bond. But in judging whether the law provides for compensation, the money value at the date of expropriation of what is given as the rate of interest compared with the ruling commercial rate is low, it will reduce the present value of the bond. The constitution guarantees a right to compensation-an equivalent of the property expropriated and the right to compensation cannot be converted into a loan on terms which do not fairly compare with the prevailing rate for compensation and devises a scheme for payment of compensation by giving it in the form of bonds and the present value of what is determined to be given is thereby substantially reduced, the statute impairs the guarantee of compensation.

Bonds

A scheme for payment of compensation may take many forms. If the present value of what is given reasonably approximates to what is determined as compensation according to the principles provided by the Statute, no fault may be found. But if the law seeks to convert the compensation determined into a forced loan, or to give compensation in the form of a bond of which the market value at the date of expropriation does not approximate the amount determined as compensation, the court must consider whether what is given is in truth compensation which is inadequate, or that it is not compensation at all. Since we are of the view that the scheme in Sch II of the Act suffers from the vice that it does not award compensation according to any recognized principles, we need not dilate upon this matter further."

The ding-dong has been silenced and the battle has apparently ceased.

Art 19(1) (f) which had made the right to acquire, hold and dispose of property a fundamental right and Art 31 which had read to the effect that no person shall be deprived of his property save by authority

of law, both appearing in Part III of the Constitution, Conclusion. have since been deleted by the Constitution 44th Amendment Act, 1978. This deletion does not, however, mean that the right to property is entirely lost. The right still remains as a legal right but is no longer inviolable. The existing laws prevail and any new law may be made in future in respect of property but such new legislations need not be tested by the provisions in Part III of the Constitution. What Art 31(1), prior to deletion, had provided has been re-enacted as Art 300A under a different part of the Constitution i.e., the part dealing with Finance, Property, Contracts and Suits. The old rulings, the hair-splitting arguments and the judicial pronouncements in such cases as in *Keshabananda Bharati's* case will no longer apply excepting to the educational institutions of minorities. That is an exception as provided in Art 30 as it stands amended at present by the 1978 Act. The question, however, still remains if the other fundamental rights under Art 19 would remain secured when the fundamental right to property is taken away.

But *Keshabananda Bharati's* case (o) was recalled as the beacon light recently by the Supreme Court in *Minerva Mills'* case (p) and certain sections of the Constitution (42nd Amendment) Act, 1976 were struck down as *ultra vires* by a Constitution Bench of the Court. The question which the Court had to determine on the basis of the majority view in *Keshabananda*

Bharati was whether the amendments introduced by Basic structure issue. Sections 4 and 55 of the Constitution (42nd Amendment) Act damaged the basic structure of the Constitution by destroying any of its basic features or essential elements. Sec 4 amended Art 31C and so amended it read

"31C. Notwithstanding anything contained in Art 13, no law giving effect to the policy of the State towards securing all or any of the principles laid down in Part IV shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Art 14, Art 19 or Art 31, and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy:

Provided that where such law is made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent."

The moot question before the Court, therefore, was, whether it is permissible to the Parliament, in view of the majority decision in *Keshabananda Bharati*, to so amend the Constitution as to give a position of precedence to

(o) *Keshabananda Bharati v Union of India*, A. I. R. 1973 S. C. 1461.

(p) *Minerva Mills Ltd v. Union of India*, A. I. R. 1980 S. C. 1789.

directive principles over the fundamental rights. The Court said: the answer to this question must necessarily depend upon whether Arts. 14 and 19 must now give way to laws passed in order to effectuate the policy of the State towards securing all or any of the principles of the Directive Policy, are essential features of the basic structure of the Constitution. It is only if the rights conferred by these two articles are not a part of the basic structure of the Constitution that they can be allowed to be abrogated by a constitutional amendment. If they are a part of the basic structure, they cannot be obliterated out of existence in relation to a category of laws described in Art 31C or, for the matter of that, in relation to laws of any description whatsoever, passed in order to achieve any object or policy whatsoever. This will serve to bring out the point that a total emasculation of the essential features of the Constitution, is by the ratio in *Keshabananda Bharati*, not permissible to the Parliament. The Court reiterated that the fundamental rights constitute the ark of the Constitution. Parts III and IV together constitute the core of commitment to social revolution and they are the conscience of the Constitution. The goals set out in Part IV have to be achieved without the abrogation of the means provided for in Part III. Anything that destroys the balance between the two parts will *ipso facto* destroy an essential element of the basic structure of our Constitution. The Court finally held that Sec 4 of the Amending Act was beyond the amending power of the Parliament and is void since it damages the basic or essential features of the Constitution, and destroys its basic structure by a total exclusion of challenge to any law on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Arts 14 and 19 of the Constitution.

Directive principles and
Fundamental Rights.

The Supreme Court similarly struck down Sec 55 of the 1976 amending Act which inserted sub-sections (4) and (5) in Art 368 thus:

“(4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this Article whether before or after the commencement of Section 55 of the Constitution (42nd Amendment) Act, 1976 shall be called in question in any court on any ground.

“(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.”

The two clauses are interlinked. The Court held that clause (5) transgresses the limitations on the amending power and so it must be held to be unconstitutional. It purports to remove all limitations on the amending power while clause (4) deprives the courts of their power to call in question any amendment of the Constitution. If it be true, as stated in clause (5) that the Parliament has unlimited power to amend the Constitution, courts can have no jurisdiction to strike down any constitutional amendment as

unconstitutional. Clause (4), therefore, says nothing more or less than what clause (5) postulates. If clause (5) is beyond the amending power of the Parliament, clause (4) must be equally beyond that power and must be struck down as such. In this connection the Court referred to its earlier decision in *Indira Gandhi's case*(q).

(q) *Smt Indira Gandhi v. Raj Narain*, A. I. R. 1975 S. C. 2299.

CORPORATION

A corporation is a body politic which constituted by or composed of one or more individuals is distinct from them, and which is vested by the policy of law with continuous identity and with the capacity of acting in certain respects as an individual.

Definition of Corporation.

An analysis of this definition or description would show three elements in the notion of a corporation: (1) its distinctness from the constituent members, (2) its continuous identity and perpetual succession, and (3) its artificiality.

A corporation is, in the eye of law, an entirely distinct person from those who constitute or compose it. The constituent member or members are not the corporation. They may sue and be sued by the corporation (a). The rights and liabilities of the latter are not the rights and liabilities of the former. It has been laid down that, generally speaking, the individuals cannot enforce the rights of the corporation of which they happen to be members (b), nor are they responsible for the proper discharge of its duties and liabilities. A corporation, being incorporeal, acts by or through its agents. But the members *as such* are not its agents. And so notice to an individual

Distinctness from constituents

"The earliest definition of a corporation of which a record has been found is in Smith's (Sir James) case (1691), Carth. 217 ; where it is stated to be an artificial body composed of divrsed constituent members like the human body and that the ligaments of this body politic or artificial body are the franchises and liberties thereof which bind and unite all its memberst ogether, and the whole frame and essence of the corporation consist therein." In 1691 Lord Holt, C. J. [Holt (K. B.) ,168] defined a corporation as an ens civile, a corpus politicum a collegium, an universitas, a jus havendi et agendi. For a later definition see Grant, Law of Corporas (1850), p. 4. where "a corporation is defined as a continuous identity ; endowed at its creation with capacity for endless duration ; residing in the grantees of it and their successors, its acts being determined by the will of a majority of the existing body of its grantees or their successors at any given time, acting within the limits imposed by the constitution of their body politic, such will being signified to strangers by writing under the common seal; having a name and under such name a capacity for taking holding and enjoying all kinds of property, a qualified right of disposing of its possessions and also a capacity for taking, holding and enjoying, but inaleenably, liberties, franchises, exemptions and privileges ; together with the right and obligation of suing and being sued only under such name." Halsbury's Laws of England, Vol. 8(301-302).

A shorter definition is given by Dillon, "Municipal Corporations" p. 91 which Mr. Brice adopts viz., "a corporation is a legal institution, devised to confer upon the individuals of which it is composed powers, privileges and immunities, which they would not otherwise possess, the most important of which are continuous legal identity and perpetual or indefinite succession under the corporate name notwithstanding successive changes by death or otherwise in the corporators or members of the corporation.

(a) *Hope v. International Financial Society* W. N. 1876, p. 257. In this case, an injunction was applied for and obtained by a share-holder to restrain the directors from acting upon a resolution.

(b) *Mozley v. Alston*, 1 Ph. 790 ; *Foss v. Harbottle* (1843), 2 Hare 461, 490. *Cooch v. Goodman*, 2 Q.B. 580.

member is not notice to the corporation (c). And lastly, the corporate funds and not the estates of the individual members are (unless there are provisions to the contrary in the constating instruments) alone and solely responsible for the payment of the debts and other pecuniary liabilities of the corporation.

The distinct legal personality of a corporation is very clearly brought out in *Salomon v. Salomon (d)*, where we have a company which was really a one-man company—the six of the shareholders whose names appeared in the memorandum of association being nearly nominal shareholders. But observed Lord Herschell notwithstanding: “The company *ex hypothesi* is a distinct legal *persona*.... It was said that in the present case, the six shareholders other than the applicant are mere dummies and.... I assume that this was so. In my opinion, it makes no difference.”

A corporation enjoys continuous identity and perpetual succession. The legal existence of a natural person ceases with his death, but that of a corporation is not affected by the death or retirement of its members or by alterations in its government and constitution. These changes notwithstanding, the corporation continues to exist with its rights and liabilities. This principle has been affirmed in a number of cases. In *Attorney-General v. Corporation of Newcastle*, the Master of Rolls expressed himself thus: “I have had on more than one occasion to consider the effect of the Municipal Corporation Act (5 & 6 Wm. IV c. 76. s. 92) and I have considered that it is not a new corporation but a newly constituted government of the old corporation; that what is called the new corporation remains subject to all the liabilities of the old corporation which have to be satisfied in the same manner as if no alteration had taken place. No doubt, some hardship occurs where liabilities are fixed on the ratepayers in a town which they were not subject to before the Act. But the liabilities of the old corporation pass with the property to the new corporation which is a continuation of the old corporation with a change of government (e).”

A corporation, though it is constituted or represented by one or more natural persons is itself an *artificial* legal entity. As Lord Coke puts it, a corporation aggregate of many is invisible, immortal, rests only in intendment and consideration of law. From this it would seem to follow that a corporation does not enjoy all the rights and obligations of natural persons, but only those with which it has been specially invested by law. This is sometimes expressed by saying that whereas a natural person may do whatever he likes except what he is expressly forbidden to do, a corporation may do only that

(c) *Steward v. Dunn* (1844) 1 Dow & L. 642, 649.

(d) 1897 A.C. 22, 45, 51; See also *Kodak Ltd v. Clark*, (1902), 2 K.B. 450; (1903), 1 K. B. 505, *Janson v. Driefontein & c. Mines*, (1902), A. C. 484; *Gramophone etc. Ltd v. Stanley*, (1906), 2 K. B. 856.

(e) *The Attorney-General v. Corporation of Newcastle*, 5 Beav. p. 315. *The Attorney-General v. Kerr*, 2 Beav. p. 420. *The Attorney-General v. Corporation of Leicester*, 9 Beav. 546.

which it is expressly allowed to do. This distinction explains many of the peculiarities of the law of corporate bodies and is in fact at the root of the doctrine of *ultra vires*.

A corporation being an artificial entity, in the sense described above, its powers or capacities are derived from its constating instruments or from custom. But in addition to these Blackstone mentions certain capacities or incidents which are common to all corporations. They are as follows:

1. To have perpetual succession.
2. To sue or be sued, implead or be impleaded, grant or receive, by its name and do all other acts as natural persons may.
3. To purchase land and hold them for the benefit of themselves and their successors.
4. To have a common seal.
5. To make bye-laws or private statutes for the better government of the corporation, which are binding upon themselves, unless contrary to the laws of the land, and then they are void.

1. *To have perpetual succession.* It has been said that corporations never die. This is true in the sense that they are not liable to die a natural death. But they are not necessarily immortal. If a corporation is created for a definite object or for a definite period it ceases to exist the moment the object is attained or the period completed. Again, a corporation may, by abusing its powers, forfeit its franchise and thus come to an end. It has been contended that at common law the King cannot create a corporation for a definite period. But the fact is that the King has more than once granted charters of incorporations which were to last for definite periods only e.g., the East India Company was by Elizabeth's charter incorporated for fifteen years only. But apart from common-law power, the King has by statute been authorised to limit the duration of corporations created by it (f).

But though a corporation does not enjoy perpetual succession in the sense that it can go on for ever, yet it may be said to enjoy it in the sense that during the period of its duration, its existence is uninterrupted, that is to say, remains identical, notwithstanding death or retirement of its members or alterations of its government. The object for which a corporation is created could hardly be accomplished, if it ceased to exist with the death or retirement of any of its members. Provisions are made in the constating instruments for the election or nomination of new members and so long as these are observed and new members nominated or elected to take the place of old ones, the corporation continues to exist.

2. *To sue and be sued. do all other acts as natural persons may.* This proposition requires qualification. As regards the powers of common-law corporations created by charter, the current of authorities seems to be in favour of Blackstone's view (g). "A corporation created by charter has at common law power to deal with its property and to incur liabilities

(f) 1 Vic. C. 73. sec. 29.

(g) Buckley on Companies and Limited Partnerships Act, 1908. p. 11.

in the same manner as an ordinary individual" (h). The Crown may, if a statutory corporation abuses its powers, repeal its franchise. "But if the Crown takes no such steps, it does not, as I conceive, lie in the mouth either of the corporation or of the person who has contracted with it to say that the contract into which they have entered was void as beyond the capacity of the corporation" (i).

Brice following Grant is not inclined to accept this view of the power of chartered corporations (j). The point is a difficult one and there is no definite pronouncement of courts of law on it. But whatever be the powers of chartered corporations, there is no dispute at present as regards those of statutory corporations. Beyond doubt, these latter have not all such powers as natural persons have. The law was clearly and definitely laid down in *Ashbury Ry. Co. v. Riche* by the House of Lords and has been followed ever since (k). "A statutory corporation created by Act of Parliament is limited to all its powers by purposes of its incorporation as defined in that Act." These bodies are created by statutes for certain purpose and are invested with certain powers, expressly or by implication. The courts have held that their acts and transactions are circumscribed by the powers given them and that they are not legally competent to engage in acts or transactions in excess of those powers.

3. *To purchase land, etc.* This is a common law power, but it has been partly restricted by Mortmain and other statutes.

4. *To have a common seal.* A corporation is incorporeal. It acts through and by its agents. Its acts and transactions have to be, as a general rule, under the common seal which serves as a proof of their authenticity e.g., when the official of a corporation affixes the common seal to an instrument, that is a clear and unmistakable indication that the corporation itself is a party to the instrument. Hence to have a common seal is the incident of every corporation, and so evidence that there was time when a borough had not a common seal was admissible to prove that it was not then a corporation. But every body politic which has a common seal is not necessarily a corporation. For example, the Inns of Courts are not corporations, though they have common seals.

"A corporation may change its seal at pleasure and even make use of the seal of an individual so long as the seal which is actually used is applied to the seal of the corporation for the time being" (l).

(h) See also Halsbury's Laws of England vol. 8 p. 359. See also *Sutton's Hospital Case* (1612) 10 Coke's Rep. (29a, 30b.)

(i) *Ashbury Ry. Co., v. Riche* L. R. 9 Ex. 263-4 per Blackburn J.

(j) Brice on *Ultra vires* pp. 4-5. It should be noticed that Blackburn J's view is mere *obiter dictum*. See also *Wenlock (Baroness) v. River Dee*, (1887) 36 Ch. D. 675, per Bowen L. J. p. 685.

(k) L. R. 7 H. L. 653. *Amalgamated Society of Ry. Servants v. Osborne*, L. R. (1910) A. C. p. 87.

(l) *Bailliffs of Ipswich v. Johnston*; 2 Barnard 120. Halsbury's Laws of England, Vol 8, p; 309. *Yarmouth Corporation v. Cowper* (1629) Godb. 439; *Cooch v. Goodman*, 2 Q. B., 580. *Gray v. Lewis* (1869) L. R. 8 Eq. 531. Mr. Brice is inclined to dissent from this view. See *ultra vires*, p. 5.

5. *To make bye-laws, etc.* A corporation is entitled to make rules and regulations to carry on its affairs. As a rule they bind the members and not outsiders, unless they had notice of the same (*m*). But in some cases, e.g., municipalities, they bind outsiders also. The rules must be just and reasonable and not uncertain, that is to say, they must give adequate information as to the duties of those who are to obey. Nor must they be at variance with the laws of the realm, inconsistent with the terms of its incorporation or beyond the scope of its powers. And lastly, they must be made in good faith; must not be manifestly partial and unequal in their operation nor involve unjustifiable interference with the liberty of those subject to it (*n*).

Locality. Every corporation must have a locality or place of habitation which is called its domicile. A corporation may have more than one domicile (*o*). The place where a corporation carries on its general business is its domicile. Thus in the case of a trading or commercial corporation, the head office from where it manages and superivses its business is its locality. It does not matter that the greater part, or the whole of its business or property is carried on or situated outside the country (*p*).

What is the status of a foreign corporation in the eye of our courts? Strictly speaking corporations which are not incorporated according to the laws of our country have no legal existence and should receive no recognition as such. As an American judge has put it, "a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created." But this strict rule of law has not been followed. It is now established that a foreign corporation whether residing in this country or abroad can sue and be sued in our courts (*q*). A foregin corporation is considered resident in this country if it carries on business at a fixed place, and for purposes of suing it service on its head office is considered sufficient (*r*).

Foreign Corporations.

Corporations are of various kinds and their classification finds a place in most text books on the subject. They may be classified according to three different modes or principles :

Classification of Corporations.

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- (*m*) *Child v. Hudson's Bay Co.*, 2 P. Wms. 207. *Re Asiatic Banking Co.*—Indian case 4. R. 4 Ch. 252.
 - (*n*) *Elwood v. Bullock*, 6 Q. B. 383. *Dyson v. L. & N. W. Ry.* 7 Q.B.D. 32. *R. v. Spencer*, 3 Burr., 1827.
 - (*o*) *Carron Iron Co. v. Maclaren*, 5 H. L. Cas. 416 per Lord St. Leonards at p. 449. But the point does not seem to be beyond dispute. See *Goerz & Co. v. Bell*, (1904) 2 K. B. 136. *Saunders v. S. E. Ry.* 5 Q. B. D., 456. *Bentham v. Hoyle* 3 Q. B. D., 289 *Shillito v. Thomson*, 1 Q.B.D., 12. *Kruse v. Johnson*, (1898), 2 Q. B., 94. *Marsh v. Findlay*, 85 L. T., p. 862. *Scott v. Pilliner*, (1904), 2 K. B., 855. *Parker v. Mayor of Bournemouth*, 86 L. T., p. 449.
 - (*p*) *Calcutta Jute Mills Co. v. Nicholson*, (1876) 1 Ex. D. 437 per Kelly C. B. at p. 444.
 - (*q*) *Dutch West India Co. v. Van Jellses*, Stra. 611 *Henriques v. Dutch West India Co.* 2 Ld. Raym, 1532.
 - (*r*) *Newby v. Van Oppen etc. Mfg. Co.*, 7 Q.B.D., 293 *Dunlop Pneumatic Tyre Co., Ltd., v. Actien-Gesellschaft fur Motor and Motor-fahrzengbau vorm. Cudell & Co.*, (1902) 1 K. B., 342.

- (1) According to the *number of corporators* necessary to constitute them.
- (2) According to the *object* they have in view.
- (3) According to the *mode of their creation*.

A corporation is either sole or aggregate according as it is composed of or represented by one or more persons. A corporation sole is for the time being constituted by a single individual; a corporation aggregate by at least two. Most corporations belong to the latter type. The number of corporations sole is limited. The King is a corporation sole; so is a Bishop and an Archbishop, the Vicar of Parish and certain other ecclesiastical functionaries.

A corporation sole is described by Grant as follows: "A corporation sole is a body politic, having perpetual succession and being constituted in a single person, who, in right of some office or function, has a capacity to take, purchase, hold, and demise (and in some particular instances, under qualifications and restrictions introduced by statute, power to alienate) lands, tenements, and hereditaments, to him and his successors in such office for ever, the succession being perpetual, but not always uninterruptedly continuous; that is, there may be and mostly are, periods in the duration of a corporation sole occurring irregularly in which there is a vacancy, or no one in existence in whom the corporation resides and is visibly represented" (s).

The corporations with which we have to deal are mostly corporation aggregate. They must consist at least of two members. In some cases their maximum or minimum number or both is limited by statute.

Here we may divide corporations into two classes *viz.*, those that are *ecclesiastical* i.e., connected with the Church of England and those that are not so, called *lay*. There are just a few ecclesiastical corporations e.g., the holders of bishoprics and archbishoprics, the colleges of Oxford and Cambridge. As is obvious from the examples, ecclesiastical corporations may be either sole or aggregate. For instance, the Bishop is a corporation sole; Trinity College, Cambridge, is a corporation aggregate.

Lay corporations may be further divided according to the various object or purposes which they are intended to accomplish. And here we may begin by placing them in two subdivisions *viz.*, *commercial* and *non-commercial*.

Commercial corporations are of two kinds, *viz.* (1) those that are of a semi-public character and (2) those that are purely mercantile. The former as much as the latter have primarily nothing else in view but gain for those who compose them. But they are distinguished from the latter in that they are invested with large powers affecting the rights of the public and that they are engaged in enterprises in which the public are interested; for example, railway companies, gas and electric companies, etc. are carried

(s) Grant on Corporations p. 636.

on primarily for profit, but though yielding profit to a limited number of private individuals, the public are highly interested in them.

The *mercantile* corporations are purely private bodies and are run for the sake of private gain. There were a few which had been created by special Charters or Acts e.g., East India Company, the Presidency Banks in this country. But most of them, like the semi-public corporations noticed above, were created under general Acts viz., the Companies Acts, "These comprise bodies of many diversity of enterprises and scope ; there is no limitation in the Companies Acts as to the purposes or objects of registered companies."

Non-commercial corporations are distinguished from the former in not being carried on for purposes of gain. They comprise bodies having a variety of purposes other than those of gain. They are *public* e.g., municipalities, district boards, universities which are corporate bodies created to look after matters of a public character ; or *private* e.g., friendly societies, co-operative associations which exist for helping their members or for some purpose other than gain.

Corporation come into existence in various ways. Individuals by any arrangement among themselves cannot incorporate themselves and give themselves the power of a corporate body. The power of incorporation was vested in the Crown and was exercised expressly or by implication. Thus we get two classes of corporations, those that exist by express authorisation and those that exist by implied authorisation. Again the express authorisation may be given either by a Royal Charter or by a legislative enactment. We thus arrive at the well known distinction between (1) *chartered* corporations and (2) *statutory* corporations. The East India Company was a corporation created by charter while the Presidency Banks were created by Acts of the Indian legislature. Again, an act of the legislature may be passed for creating a particular corporation, as for example, the Bengal Legislative Council passed an Act creating the Calcutta Improvement Trust or, the act may be of a general character whereby an indefinite number of corporate bodies may be created on compliance with its provisions. The Indian Companies' Act of 1882 was an Act of this character.

Both chartered and statutory corporations exist by the *express* authorisation of the Crown. We shall now notice those which exist by its implied authorisation. These are—

- (1) corporations at common law,
- (2) corporations by prescription,
- (3) corporations by implication ;

These are bodies whose corporate character has been recognised from time immemorial by the State. The King is a corporation at common law. So are parliament, holders of bishoprics, etc.

Corporations at
common law.

These, too, like the former, have existed from time immemorial. But

it is supposed that they were created by Royal charter or Act of Parliament which had been lost. Unlike the former, they have to prove that they have exercised corporate rights in a course of immemorial uniform usage and in pleading they must aver that they have existed from time immemorial.

Corporations by prescription.

These are not supposed to have existed from time immemorial, nor do they claim to have been created by Royal Charter or Act of Parliament.

Corporations by implication.

They claim corporate rights by virtue of the fact that they have been invested with rights and duties which cannot be properly discharged except on the assumption that they are corporate bodies. Thus a grant of land by the Crown to the men of Islington, *without saying to them and their successors*, rendering rent, was considered in law to have incorporated them for the purpose of the farm ; for without such an incorporation, the grant could not be fully carried into effect^(t).

We have seen how corporations come into being. We shall now see how they manage their affairs. A corporation, though an intangible entity, is constituted by one or more individuals. A corporation aggregate should have at least two members. But there is no limit at common law on the number. Members may be either elected or nominated, or they may become such by making certain payments or by the possession of some qualification or other. It cannot be too well impressed that the members, though they constitute the corporation and though their interests may be closely bound up with those of the latter, are not the corporation. Corporately assembled, their acts the acts of the corporation, but the members, in their individual capacity, apart from any statutory provisions, have no rights or liabilities in respect of the corporation.

Membership of a corporation confer certain rights, privileges, etc., on the members. But it also imposes duties, on the non-performance of which, the defaulting member may be expelled. The

Power of corporations over members.

right of expelling a member or disfranchisement, as it has been called, is an incident of every corporation (u). It involves the total deprivation of all rights, interests and privileges which the member enjoyed as a corporator. The right of disfranchisement may be exercised against a corporator not only for an offence against his duty as a corporator but also for a heinous or atrocious crime (v). It is still a moot point whether this extensive power belongs to joint-stock limited companies. Mr. Brice holds that such corporations have no implied power to eject their members, however troublesome they may be, or however hostile their acts be to the welfare and

(t) See Grant on Corporations p. 8 *cf.* *Chilton v. Corporation of London* 'A grant by the Crown of a *profit a prendre* out of Crown lands to the inhabitants of a parish constitute the inhabitants a corporation *quoad* the grant 7 Ch. D. p. 735.

(u) Brice on the *Ultra vires*, p. 32.

(v) *Hope v. International Financial Society*, 4 C. D. 327.

prosperity of the whole body. But such a power might unquestionably be given by express provision in the constating instruments, as is indeed in reality done whenever the company or its directors are authorised to forfeit shares for non-payment of calls. But even, where such power is given, it is not to be supposed that the courts will acquiesce in the corporations exercising the same. Thus, where the articles of association of a company provided that any member who brought or threatened to bring legal proceedings against the company or its directors would forfeit his shares, and a member brought an action for restraining the directors from acting upon a resolution, it was held that the clause was invalid and that the company had no power to forfeit shares.

It has been stated more than once that the corporators have no powers in their individual capacity in respect of the corporation. But "the members in general meetings assembled constitute a forum supreme in all that relates to the internal arrangement, provided they keep within the corporate powers and act in subordination to the immutable statutes, if any, which form its constitution" (w). Such corporate meetings should be properly convened, accompanied by all formalities.

A corporator has the right to be present at every meeting of the corporation, unless such right does not exist by custom or has been taken away by the provisions in the constating instruments or bye-laws. On every occasion therefore that a meeting is to be called every member should be sent a notice. Notice
Omission to send such notice will render the whole proceedings, as between the particular member and the corporation, invalid (x). But a member, if he happens to be present, even though no notice has been sent to him, cannot afterwards set up the informality to invalidate the proceedings (y); nor, if he afterwards acquiesces in the proceedings of the meeting, can he repudiate the same (z). The notice should state the place, date and time of the meeting, unless there is some rule or custom, known to the members, which determine the same. It should also specify the business to be transacted at the meeting. No business other than what is specified in the notice can be validly transacted at the meeting for which the notice has been sent. But the transaction of business other than what is specified in the notice will not render the whole proceedings irregular (a).

The presence of a quorum is necessary to the validity of the proceedings of a corporate meeting. The quorum may be fixed by custom or the constating instruments. Where they are silent the necessary quorum is constituted by the majority of the

(w) Brice on *Ultra Vires*, p. 32.

(x) *People's Ins. Co. v. Westcott*, 14 Gray 440. *Alexander v. Simpson*, 43 Ch. D. 139.

(y) *R. v. Chetwynd*, 7 B. & C., 695. *Re. British Sugar Refining Co.*, 26 L. J. (Ch.) 369.

(z) *Turquand v. Marshall*, 4 Ch. 376; *Smallcombe v. Evans*. L. R. 3 H. L. 249.

(a) *Graham v. Van Diemen's Land Co.*, 26 L. J. (Ex.) 73. *Re Irrigation Co. of France* ex parte Fox, 6 Ch. 176.

corporators. As Wills J. puts it: "The acts of a corporation are those of the major part of the corporators, corporately assembled.... This means that in the absence of special custom the major part must be present at that meeting and that of the majority, there must be a majority in favour of the act or resolution (b).

The decision of the majority at a corporate meeting binds the minority and may be enforced against them by the court, unless there be fraud (c). It should be noticed, however, that the acts or resolutions of the majority have no force if they are *ultra vires* and the minority is always entitled to relief in respect thereof.

Almost every corporation employs one or more persons to manage and look after its business or affairs. In the case of big trading or commercial concerns the necessity of employing such persons is obvious. The number of members may vary from half a dozen to a few hundreds and thousands. In the absence of any provisions to the contrary, they are all entitled to take part in the transaction of corporate affairs. But as a rule only certain matters are left to them; the rest of the business is done by a limited number of persons appointed specially by the corporation. It is those people who represent the corporation and who on its behalf enter into transactions with outsiders. They occupy the position of general agents and trustees.

Beside these, a corporation employs a number of persons who are entrusted with the transaction of its daily ordinary business e.g., managers, clerks and so forth. They are also agents of the corporation, but not general agents. Their agency extends to the special business with which they are entrusted.

Corporations, as we have seen, at least statutory corporations, have only those powers with which they have been invested. They are created or exist for certain purposes, and apart from any prohibitions to the contrary, they enjoy all the powers necessary for accomplishing them. In other words a corporation can do all such things as fall within the scope of its objects as determined by the constituting instruments. But beside this express power, a corporation is considered to have power to do all such things as are reasonably incident to and may reasonably and properly be done under the main purpose, though they may not literally be within it (d). That such implied power exists has been affirmed more than once, though there may be difficulty in any particular case whether under the constituting instruments, a power is sought to be given or not.

Take the case of railway companies. As falling within the scope of its main object, it would have the express power of buying rolling stocks,

(b) *Merchants of the Staple of England Co. v. Bank of England*, 21 Q.B.D. 160.

(c) *Gosling v. Vele* (1847) 7 Q. B. 406. *Exeter and Crediton Ry. Co. v. Buller* (1847) 5 Ry. & Can. Cas. 211. *Society of Practical Knowledge v. Abbott*, 2 Beav. 559.

(d) *Attorney-General v. G.E. Ry. Co.*, 5 App. Cas. 478. *Small v. Smith*, 10 App. C. 119.

laying down the lines, building station yards, employing men and so forth. It has been decided that it would have the further power of building and running hotels and restaurants for the use of its passengers (e), of running omnibuses (f), keeping bookstalls (g) and doing such other things as would conduce to the comfort of its passengers or would add to its own profits (h). It is plain that none of these falls within the main scope, yet they are allowed on the ground that they are incidental to the business of the railway company and are conducive to its proper development.

How far these deviations from the main business and enterprise will be allowed, it is very difficult to say. But as Mr. Brice says "whatever be a company's legitimate business, the company may foster it by all the usual means; but it may not go beyond this; it may not under the pretence of fostering, entangle itself with which it has no legitimate concern (i)." Thus a railway company is within its implied powers in erecting hotels or restaurants; but it is doubtful whether it can build bakeries for preparing its own bread etc. The former would be incidental to the carrying on of the main enterprise; but the latter would launch the company in an altogether different enterprise and would be, it is submitted, ruled *ultra vires*.

Though, as Romilly, M. R. remarks in *Gregory v. Patchett* (j), "it is very easy to point out many cases in which the right to interfere is unquestionable," there have been many cases where considerable difficulty has been felt in deciding whether an act or transaction could be justified under the implied powers of the corporation. The two cases of *South Wales Ry. Co. v. Redmond* (k) and *Colman v. Eastern Counties Ry. Co.* (l) are instructive on this point. In the former, the plaintiff company whose railway terminated at Milford Haven entered into a contract with the defendant for steam boats to run between that place and Ireland. It was held that the contract was not *ultra vires* and that the defendant having provided an unseaworthy vessel was liable in damages. In the latter, the plaintiff company agreed to grant a subsidy to a steam-packet company running in conjunction with their own line. It was held that they were a corporation for the purpose of making and maintaining the railway sanctioned by the Act of Incorporation and that the majority of the shareholders could not validly grant a subsidy to the steampacket company for the aforesaid purpose against the wishes of the minority (m).

While dealing with the capacities of corporations, we have to deal with

(e) *Flanagan v. G. W. Ry. Co.*, 7 Eq. 116.

(f) *Shrewsbury, etc. Ry. Co. v. Stour Valley Ry. Co.*, 2 D. G. M. & G., 866. But see *A. G. v. London County Council*, (1902) A. C. 165.

(g) *Holmes v. Eastern Counties Ry. Co.*, 3 K & J 675.

(h) *Foster v. London, Chatham, Dover Rail Co.*, (1895) 1 Q.B. 711.

(i) Brice on *Ultra Vires* p. 150.

(j) 33 Beav. 595.

(k) (1861), 10 C. B. (N. S.) 675.

(l) 10 Beav. 1.

(m) See also *Stephens v. Mysore Reefs &c. Ltd.*, (1902) 1 Ch. 745. *Pedlar v. Road Block Gold Mines &c. Ltd.*, (1905) 2 Ch. 427.

the question of their capacity to acquire property. As has been already mentioned, according to the old common law of England, the right of corporate bodies to acquire property is unlimited. The power to acquire personal property to any amount, provided such acquisition be not *ultra vires*, still remains. But the power to acquire realty has been greatly curtailed by Mortmain and other statutes. Their effect has been that no landed property can be validly assured to a corporation, unless the latter has the power to acquire land under authority of a license from the crown or of a statute. If land is assured to a corporation not having such requisite authority, the crown or the mesne lord may enter and hold the land so assured.

But even where the corporation has the requisite authority, its acquisition of property, (whether real or personal), must be sanctioned by its constating instruments as falling within the scope of its business or enterprise or as incidental to it. That is to say, the doctrine of *ultra vires* applies as much to the acquisition of property as to any other corporate transaction. Take the case of a railway company. It cannot, under the Mortmain and other statutes, acquire any lands, unless it is authorised to do so, either by a general or a special statute or by licence from the crown. But suppose it has the requisite authority. Even then the acquisition of lands, as also of the amount acquired, must fall within the scope of its business or enterprise. A railway company, for example, having power to buy lands, cannot buy more land than is necessary, nor in a locality where they would be of no use to it, or for the purpose of speculation. All these transactions would be *ultra vires* as outside the company's powers.

The above remarks apply to the acquisition of personalty as much as to realty. Here the corporation retains the old common law right of acquiring as an ordinary individual has. But all such acquisitions must be necessary to or incidental to its business or enterprise.

An interesting question arises here. Suppose property has been conveyed to a corporation which has not the authority to acquire it. What are the legal effects of the transaction? It may be laid down as a general rule that either party may rescind the transaction and ask for a reconveyance, but that before such reconveyance is made, the property remains legally vested in the corporation (n).

As a general rule, transactions entered into by corporations (at any rate statutory corporations) will not be considered binding on any party as being *ultra vires*. This principle is not so rigorously applied as we might expect. The whole theory of implied powers of corporations is an illustration of the relaxation of this rule in practice. We have seen that corporations are allowed to deviate from the main line of their business or enterprise, provided such deviation is incidental to its main business or enterprise, but

(n) This proposition is laid down on the authority of Mr. Brice; See *Ultra Vires* p. 84 and the cases cited. See *Ayers v. South Australian Banking Co.*, L. R. 3 P. C. 548. *G. E. Ry. Co. v. Turner*, (1872), 8 Ch. App. 149. *Overseers of Putney v. L. & S. W. Ry. Co.* (1891), 1 Q. B. 440.

the courts have gone further. It has been held that if a corporation engage in a transaction which is duly authorised, and, as a consequence, becomes involved in transactions which are not authorised, such transactions will nevertheless be supported, if they (a) are necessitated by special circumstances; (b) could not have been foreseen (c) are temporary and (d) matters of management. This appears to have been laid down in *Re Asiatic Banking Corporation, Royal Bank of India's case* (o).

It should be noticed however that these *ultra vires* transaction will be supported only under the conditions set forth. If a corporation engages in a series of such transactions, it would not be allowed to claim exemption from the general rule. It is only when they are resorted to as temporary measures for escaping a difficulty which was not foreseen that the exemption will be allowed. Two cases cited by Brice illustrate the point. Thus in *Sackets Harbor Bank v. Lewis Company Bank* (p), it was held that the plaintiff company as also the defendant company, though prohibited by their charters from buying or selling any goods, etc., was justified in receiving butter in lieu of a debt, when the debtor was unable to pay the same, and necessarily in selling the same, and here the inability of the debtor to pay the debt was unseen, selling of the butter was only a temporary expedient and a matter of management. Held accordingly that the transaction was binding.

On the other hand, in an American case cited by Brice "it was decided to be *ultra vires* of an insurance company to purchase and discount the bills of a policy holder in the hands of third parties with the intention of setting them off against his claim under his policy." Here the company entered into a series of *ultra vires* transactions which could not be therefore supported (q).

Hitherto we have been dealing with the principles of *ultra vires*, the term being taken in its primary and secondary sense.

But, as has been already stated, the term is used in a third sense: to mean acts which though *intra vires* the corporations are *ultra vires* the officials who are charged with the control and management of the business or affairs of the corporation. A corporation cannot act by itself. It acts by and through certain persons, variously known as the governing body, the Board of Directors, councillors, commissioners etc. These persons are the agents of the corporation and can bind the latter in respect of dealings and transactions with third parties. But their agency is derived from and limited by, the powers which are given to them expressly or by implication in the constating instruments. Acts which are within the powers of the corporate body but forbidden its officials by the constating instruments are *ultra vires* and are inoperative and do not bind the corporation. The reason for this is that the officials of the corporation,

(o) L. R. 4 Ch. 252.

(p) 11 Barb. 213.

(q) Brice, *Ultra Vires*, p. 178. *Strauss v. Eagle Ins. Co.*, 50 Ohio, 59.

though they are agents of the latter, are merely special agents. They are authorised to engage in certain transactions for the purposes of the corporation, and, as is sometimes the case, expressly forbidden to engage in certain others. The outside world would thus have knowledge of the extent of their authority and should refrain from engaging in transactions beyond that authority. If they do so, they do it at their own risk and must look to the officials and not to the corporation. This is clearly brought out in a passage of Lord Wensleydale's judgement in the well-known case of *Earnest v. Nicholls*. "All persons must take notice of the deed (i.e. of settlement) and the provisions of the Act. (i.e. 7 & 8 Vic. c. 110). If they do not choose to acquaint themselves with the powers of the directors, it is their own fault; and if they give credit to any unauthorised person, they must be contented to look to them only and not to the company at large. The stipulations of the deed which restrict and regulate their authority are obligatory on those who deal with the company; and the directors can make no contract so as to bind the whole company of shareholders, for whose protection the rules are made, unless they are strictly complied with" (r).

Of course, only those acts and transactions will be *ultra vires* which are forbidden or unauthorised by the constating instruments and which strangers may be expected to know from a perusal of the instruments. If an act is not forbidden by the constating instruments and is within the powers of the corporation, it would not be judged *ultra vires* merely by reason of the fact that the officials had as a matter of fact been forbidden to do it. The court will not inquire into the *actual* authority of the officials but into their *apparent* authority so far as it can be gathered from the constating instruments. Thus a bye-law restraining the powers of directors is not binding upon strangers dealing with the company, provided they had no knowledge of the same, on the ground that such a bye-law forms no part of the memorandum and articles of association which alone determined the powers of directors so far as strangers are concerned (s).

We have seen *ultra vires* acts or transactions, except under special circumstances, are invalid and will not be supported. Let us see what the full import of this is.

(1) If the act is still executory, the corporation as also the other party may repudiate it. Further if the officials of the corporation or the majority of the members propose to do an *ultra vires* act, they may be restrained from doing it by the minority or even by a single member.

(2) Let us suppose one of the parties to the transaction has done his part under the agreement, what is the position? The general rule is that the other party may repudiate the transaction even at this stage and that the party who has done his part under the agreement has no cause of action against the other party *under the agreement*, though, as we shall see presently,

(r) 6. H. L. C. 419.

(s) *Re Asiatic Banking Co.—Royal Bank of India's Case*, L.R. 4 Ch. 252. See Per. Sir C. J. Selwyn L. J. at p. 256-7, Sir G. M. Giffard, at p. 262.

he may have a cause of action *in equity* for any benefits which the other party may have received from him.

(3) But let us go further and suppose that both parties to the transaction have done what they had promised. Can they reopen the whole transaction and ask to be reinstated in their original position? This is a difficult point and the law cannot be stated with any precision. It has been said that "when *ultra vires* transactions have been completed," then as between parties to them and the corporation, the matter is absolutely ended for all purposes and no further claim can exist on the part of the one against the other." But what is meant by a "completed" transaction? (t).

There is an interesting question which arises here, viz., how can a corporation which has entered into an *ultra vires* transaction (or the other party to it), in view of the general law of estoppel take advantage of its incapacity and give evidence of the same to repudiate the transaction? The answer is furnished by Fry, L. J. in *British Mutual Banking Co. v. Charnwood Forest Railway Co.*, (u). Estoppel.

"It is plain that the action cannot succeed on any ground of estoppel, for otherwise the defendants would be estopped from denying that the stock was good. No corporate body can be bound by estoppel to do something beyond their powers (v)."

As a general rule, a corporation is not bound by *ultra vires* transactions and is entitled to repudiate them, provided they are not "completed." From this we are not to infer that it has no liability in respect of such transactions. Liability in *ultra vires* engagements.

If for example, the corporation has agreed to buy some property *ultra vires* its powers, it may refuse to buy. Again, if the property has passed, but the purchase money has not been paid, it may refuse to pay the purchase money. But while the corporation may thus repudiate *ultra vires* transactions, it may not at the same time appropriate any benefits under them. The equitable principle of accounting for benefits had and received has been applied to *ultra vires* transactions which have been executed by one or other of the parties, and the corporation (or the other party to the transaction) must account for any benefit it may have received under them.

Thus in *Burge's and Stock's* case (w), a life assurance company issued marine policies and received premiums payable on them. On a winding up, it was held that the claimants could not prove for losses on the policies, but that they are entitled to prove in respect of the premiums they had paid.

Similarly, in *Ex Parte Key* (x), where a company took a lease under an *ultra vires* agreement, it was held that the lessor was entitled to prove in the winding up for the use and occupation by the company of the premises.

(t) See Brice *Ultra Vires*, pp. 696-7.

(u) 18 Q. B. D. p. 714.

(v) Cf. *Overseers of Putney v. L. & S. W. Ry. Co.* per Bowen, L. J. (1891) 1 Q. B. p. 440.

(w) *Re Phoenix Life Ass. Co.*, 2 J. & H 441.

(x) *Burslem Paper Mills Co.*, 16 W. R. 1103.

The principle of accounting for benefits had and received has been extended in various ways. It has been established by a series of decisions that *ultra vires* advances made to a corporation which are utilised for the purposes of the corporation, either for discharging its debts or liabilities or for meeting any of its other necessities, must be repaid to the extent they have been so utilised. This was the decision in *Re the German Mining case* (y), the facts of which are as follows: a joint-stock company was formed in England for working mines in Germany. The deed of settlement provided that the capital should be £5000 and gave no power to the directors to raise money except by the creation of new shares. The capital that was paid up proved insufficient for the working of the mines. The wages of the miners being in arrears and other debts being due, the managing directors obtained advances from some of the shareholders for the purpose of paying those and prevented the mines from being seized under the law of the country. The directors also borrowed other sums on their personal guarantee from the bankers of the company not for the repayment of the debts but in carrying on the business of the company in its ordinary course and they afterwards repaid the bankers these advances. On a winding up, it was held (1) that the advances made by the shareholders to pay debts of the company might be set off by them with interest against a call. Turner L. J. observed as follows: "I think that the shareholders by whom these advances were made would, in common with the other shareholders, have been liable to the miners and creditors who were paid by means of the advances, and therefore that assuming the mines to have been properly carried on, upon which I have already observed, and shall presently observe more fully, and assuming the expenditure to have been properly incurred, (which upon the footing of the mines being carried on is not disputed), the decision of the Master (*viz.*, that the shareholders should be allowed to prove on their advances) ought to be upheld upon that ground alone"(z).

(2) That although the advances made by the bankers did not constitute a debt due to them from the company, the directors having no power to borrow, the directors were entitled to be allowed the amounts repaid by them to the bankers—the directors being trustees were in that character entitled to indemnity from their *cestuique trustent* against expenses *bonafide* incurred.

It will be observed that the grounds of the decision in (1) and (2) are different. In (1) the shareholders are held entitled to prove on the ground that the advance, made by them were expended in the payment of the debts of the company. In (2) the directors are held entitled to prove on the ground that as trustees they ought to be indemnified for any losses they might have been put to in carrying on the ordinary business of the company on behalf of the *cestuique trustents*.

The doctrine laid down here has been followed in a number of cases.

(y) 4 De G. M. & G. 19.

(z) Per Turner L. J. 4 De G. M. & G. p. 41.

In *Troup's* case (a) the directors of a company having no borrowing powers, being pressed for money by their contractor obtained for him on credit £2000 at a banker's upon their guarantee. The contractor afterwards agreed to abandon the plant, etc., to the company on receiving £600 and being indemnified against the banker's claim. Subsequently to this, the secretary of the company, with the sanction of the directors, borrowed £500 in his own name for the company which was applied in paying the bankers and a judgment debt of the company. The company had the benefit of the plant. It was held that the secretary could recover from the company the money *bonafide* applied for its benefit with interest.

The principle underlying the decisions in these and other similar cases is well brought out in a passage in Lord Selbourne's judgment in *Cunliffe, Brooks & Co. v. Blackburn etc.*, which we shall quote here. "The test is, has the transaction really added to the liabilities of the company? If the amount of the company's liabilities remains in substance unchanged, but there is merely for the convenience of payment a change in the creditor, there is no substantial borrowing in the result, so far as relates to the position of the company. Regarded in that light, it is consistent with the general principle of equity that those who pay legitimate demands which they are bound in some way or other to meet and have had the benefit of other people's money advanced to them shall not retain that benefit, so as in substance to make these other people pay their debts. I take that to be a principle sufficiently sound in equity: and if the result is that by the transaction which assumes the shape of an advance or loan, nothing is really added to the liabilities of the company, there has been no real transgression of the principles on which they are prohibited from borrowing" (b).

The principle of accounting for benefits had and received not only applies where the advances have been expended in the payment of already existing debts but also where they have been expended in the payment of debts which accrued subsequent to the advances (c).

Consistently with the principle enunciated above, it has been held that the creditors of a corporation whose advances have been utilised in the payment of its debts and have been devoted to its other necessities may not only prove for the advances they had made, but further that they may hold any property which may have been deposited with them by way of security for such part of the money advanced by them as has been applied in payment of the legitimate debts and liabilities of the corporation (d).

It should be clearly understood that in these *ultra vires* advances or loans to a corporation, the creditor can only recover to the extent the corporation has been benefited by them and no further, and secondly, that it is

(a) *Re Electric Telegraph Co. of Ireland*, 29 Beav. 353. See also *Hoare's Case*, 30 Beav. 225.

(b) *Cunliffe, Brooks & Co. v. Blackburn, etc.*, 22 Ch. D. 61 ; 9 App. C. 857.

(c) *Baroness Wenlock v. River Dee Co.*, 19 Q. B. D. p. 155.

(d) *Cunliffe, Brooks & Co. v. Blackburn, etc.*, 22 Ch. D. 61.

for the creditor to prove how far the corporation has actually been benefited by his advances (e).

Almost every corporation owns some property, though ownership of property is not essential to its existence. It can own and acquire personalty to any amount, provided it is not *ultra vires*. As regards realty, it cannot own and acquire any unless it is properly authorised either by a license from the crown or by statute. The property is the exclusive property of the corporation and not of the corporators, although they may derive benefits from it (f). Being corporate property it can only be used for corporate purposes. It cannot be made liable for any transaction which is *ultra vires* the corporation and the latter can always be restrained from misapplying the funds to *ultra vires* purposes (g).

Various Corporation recognised in India included the Sir Sassoon Jacob David Baronetcy Act (II of 1915), the Sir Jamsetjee Jejeebhoy Baronetcy Act (X of 1915) the Sir Currimbhoy Ebrahim Baronetcy Act (IV of 1913) under which trustees have been incorporated for the administration of the estates of the persons concerned therein.

Port Trusts.—Under the Chittagong Port Commissioners Act (IV of 1887), the management of the office of the Port of Chittagong was vested in a body corporate called the Commissioners of the Port of Chittagong, partly elected by certain commercial bodies and partly nominated by the Local Government. The commissioners may hold property, may construct and carry out certain specified works, may frame a scale of tolls and charges, may make contracts within certain limitations, may raise loans on debentures and may make rules consistent with the Act for carrying out the purposes of the Act.

In an action by Harbour Commissioners against a coal exporter, who brought coals by rail to the harbour for shipment, asking for a declaration that they were entitled to charge rates on all coal shipped as bunker coal or otherwise, and for payment of arrears of rates, the defendant averred that the commissioners had not charged the export rates in the case of other traders, and in particular had not levied export rates on any sea-borne bunker coal supplied to fishing vessels by certain named traders. He pleaded that this practice amounted to an illegal and undue preference at common law, and that consequently the imposition of such rates on him was illegal and *ultra vires*. The commissioners admitted in evidence that, when rates had already been charged on sea-borne coal, they had not hitherto made a second charge on its re-shipment as bunker coal, taking the view that it was exempted

(e) *Ex parte Williamson*, L. R. 5 Ch. 309. *Re Cork & Youghal Ry. Co.* L. R. 4 Ch. 748. *Cunliffe, Brooks & Co. v. Blackburn etc.*, 22 Ch. D. 61.

(f) *Rev. Arnand*, (1846), 9 Q. B. 806, 817, 818. *Society of Practical Knowledge v. Abbott*, (1840) 2 Beav. 559, per Lord Langdale M. R. at 564.

(g) *Trevor v. Whitworth*, 12 App Cas. 409. *Colman v. Eastern Counties Ry. Co.*, 10 Beav. 1; 16 L. J. (Ch) 73.

East Anglian Ry. Co. v. Eastern Counties' Ry. Co., 11 C. B. 775. The Court of Common Pleas stated....."the funds can only be applied for the purposes directed and provided for by statute."

by virtue of a provision in their schedule of rates exempting from further charges goods which had paid rates on importation, where "such goods shall be re-shipped in the original packages and shall not have changed ownership." They explained, however, that the trade was of recent growth ; that they had made no special arrangement with traders and had granted no discharges for rates ; and that, even if they were bound to charge rates on the re-shipment of sea-borne coal, the shippers had made it impossible for them to exact the rates by refusing to furnish accounts of their shipments of all bunker coal, both sea-borne and rail-borne. It was held, that no case of undue preference had been proved, and that coal re-shipped as bunker coal did not fall within the exemption founded on by the commissioners (*h*).

Universities.—Since the passing of the Indian Universities Act, 1904, several universities have been constituted or re-constituted in different parts of India; Benares Hindu University ; the Patna University ; the Dacca University ; the Delhi University ; the Lucknow University ; the Rangoon University ; the Aligarh University ; the Allahabad University ; the Calcutta University ; the Madras University ; the Jadavpur University ; the Burdwan University ; the Kalyani University ; the Agra University ; etc.

Under these Acts, the powers of the University have been enlarged, and the constitution made more representative. The limits of the powers of the University and its governing bodies are defined in the respective Acts and so long as such powers are exercised within such limits and in the manner prescribed all acts so done will be valid. These statutes have been amended and replaced from time to time.

In the matter of G. A. Natesan (40 Mad. 125) the powers of the Senate and the Syndicate of the Madras University under the Madras University Act of 1857 and Indian University Act of 1904 were discussed. In granting an application for an order under section 45 of the Specific Relief Act by a fellow of the Madras University against the Syndicate for the purpose of compelling the Syndicate to forward to the Government a protest of his under Regulation 64 of the University Regulations against a resolution of the Senate, it was held that a regulation of the Senate provided for protest to Government in respect of all its resolutions will be *ultra vires* in respect of those which do not under the Act require the sanction of the Government.

Rule 5 of the regulations for the conduct of examination framed by the University of the Punjab, provided that any candidate detected in giving or receiving assistance or in the use of any other unfair means in connection with an examination shall be disqualified from passing it and also from appearing at any University examination for a period of two years from the date of his disqualification and this rule was not *ultra vires* (*i*).

In re Abdul Rasul (*j*), it was held that the question whether the sanction required under Sec. 12, Ch. XI of the Calcutta University Regulations for the appointment of a University lecturer was *ultra vires* or not could not be determined in summary proceedings.

(*h*) *Fraserburgh Harbour Commissioners v. Will.*, (1916) S. C. 107.

(*i*) *Tajahmad v. the University of the Punjab, Lahore*, 2 Lah. 197.

(*j*) 41 Cal. 518.

The Co-operative Society Act (II of 1912) was passed to facilitate the formation of Co-operative Societies for the protection of thrift and self-help among agriculturists, artisans and persons of limited means. Under it any society which has as its object the promotion of economic interests of its members in accordance with co-operative principles or a society established with the object of facilitating the operations of which a society may be registered with or without limited liability. These societies are declared bodies corporate with power to hold property, enter into contracts and the like with perpetual succession and a common seal. The society cannot advance a loan to any person other than a member and cannot take deposits from persons other than members beyond what is prescribed by the rules or bye-laws. It may invest its fund in certain specified securities. No part of the funds may be divided by way of bonus or dividend or otherwise, except out of reserve fund and a contribution may be made with the sanction of the Registrar, to any purpose coming under the Charitable Endowment Act, 1890. The provisions of the Indian Companies Act do not apply to these societies.

Provident Society.—The rules of a Provident Society provided that all disputes arising between a member and the society should be settled by arbitration. An action having been commenced by a member of the society for a declaration (a) that resolutions passed by the committee of the society purporting to permit certain members to withdraw from their membership or to give up shares, and authorising payments consequent thereon, and (b) further resolutions authorising the conveyance of land belonging to the society to certain members in consideration of the cancelling of their shares were *ultra vires* and void, the defendants applied that all proceedings in the action might be stayed on the ground that the matters in difference between the parties were disputes within the meaning of section 49 of the Industrial and Provident Societies Act, 1893. It was held that the disputes came within the pervuew of that section, and that the proceedings must be stayed (k).

Friendly Society.—The transfer by a Friendly Society of £50,000 out of its actuarial surplus to the fund for providing pensions on retirement for those engaged in the active service of the society was held not to be *ultra vires* of the society (l).

By the rules of a registered Friendly Society it was provided that meetings for the "management of the society" should consist of "delegates," elected by the members. It was held that a resolution for the conversion of the society into a limited company, in terms of section 71 of the Friendly Societies Act, 1896, passed by a general meeting of "delegates" was *ultra vires*, in respect that under that Act a resolution for conversion could only be carried by a certain majority of the members of the society at a general meeting of members and that requirement was not affected by the rule of the society providing that meetings should consist

(k) *Cox v. Hutchinson*, (1910), 1 Ch. 513 : 79 L. J. (Ch.) 259; *Stone v. Liverpool Marine Society*, 63 L. J. (Q. B.) 471 applied.

(l) *Kirsopp v. Helghton*, 28 T. L. R. 493,

of "delegates", accordingly, that a scheme for the conversion of a Friendly Society into a company, the memorandum of association of which permitted (a) the distribution of surplus assets among members, who under the rules of the society would have had no right to participate in that surplus and (b) payments to employees of sums out of capital which were unauthorised by the society's rules, was *ultra vires* (m).

By section 77 of the Friendly Societies Act, 1896, the Chief Registrar may on proof that a society exists for an illegal purpose cancel the registry of the society. It was held that the mere fact that a society exists for the purpose of doing acts which are *ultra vires* its rules does not make it a society which exists for an illegal purpose within the meaning of the section, that the illegal purpose must be one which is unlawful independently of the rules; and that, for the purpose of determining the question whether a society exists for an illegal purpose, the time at which the illegality of the purpose is to be considered is the time at which the cancelling order is proposed to be made (n).

Trade Unions.—Trade Unions must be classed under Friendly Societies. They were generally registered under the Societies Registration Act (XXI of 1860) in India.

The general trustees of a society established as a trade union under the Trade Union Acts 1871 and 1876, acting in pursuance of a resolution of the General Council, subscribed £100 of the moneys of the society for shares in a limited company which had been formed with the object of publishing a newspaper in the interests of the Labour Party, and whose profits, after payment of 4 per cent, on its shares, were to be used in the maintenance and extension of its business. The object of the resolution of the General Council was not simply to invest the moneys of the society, but to contribute to the expenses of publishing the newspaper. The shares were applied for and allotted before the passing of the Trade Union Act, 1913. There was nothing in the rules of the society which authorised the application of its funds for political purposes. It was held that the above application of the funds of the society was unauthorised and *ultra vires*, and not the less so because of the provisions of the Trade Union Act, 1913, as that Act gave the society no further powers with reference to political objects than those contained in the rules of the society, and that, therefore, the trustees were liable to make good the £100 with interest (o).

A trade union was established in order "to obtain for its members the best possible conditions of labour in connection with the trade, and the establishment of a fund for the relief of its members in sickness, with medical and surgical aid, assistance to members out of employment, accidents, old age, for the interment of deceased members and their wives, and for regulat-

(m) *Willkinson v. City of Glasgow Friendly Society*, (1911), S. C. 476.

(n) *Re Middle Age Pension Friendly Society*, (1915) 1 K. B. 432. See also *Performing Right Society v. London Theatre of Varieties, Ltd.*, (1922) 2 K. B. 433.

(o) *Bennett v. National Amalgamated Society of Operative House and Ship Painters and Decorators*, (1915) W. N. 73 : 113 L. T. 808.

ing the relations between employers and employees, and to attain these objects or some of them by assisting in securing legislation for the purpose of its trade subject to the Trade Union Act 1913. The rules further provided that the executive council were to exercise full control over the funds of the society and administer the same in strict accordance with the rules ; that the funds of the society were to be invested in the Post Office Savings Bank unless otherwise sanctioned by the executive council and by rule 39 "the executive council and branches may propose places in which to invest the reserve fund; the same shall be submitted to the members to decide by vote. Except in any corporate body under public control, all above £4 per member to be invested so that it can be obtained at any time by three months' notice." It was held that the application of the society's money in the purchase of shares in a company, the principal object of which was to promote the policy of the labour party by the publication of a newspaper, was not within any of the objects of the society as defined by its rules nor an ordinary investment of the society's funds within the rules, but was simply a contribution towards the expenses of publishing a political newspaper and, therefore was *ultra vires* ; and that the moneys having been misapplied, the members of the executive council were personally liable to make them good to the society (p).

M, a member of a trade union, at meetings of the union, made various attacks on its officers, accusing them of misconduct in connection with the affairs of the trade union. It was afterwards resolved that the union, the general secretary, the committee, and lodges should take proceedings in respect of these attacks on behalf of the union or in their own names. The trade union did not take any such proceedings, but the general secretary sued M for slander and obtained a verdict. M was unable to pay the damages or the costs, and the trade union paid out of its funds the costs incurred by the general secretary to his solicitor. There was no rule of the trade union authorising such a payment. In an action by a member for a declaration that such payment was *ultra vires*, and for repayment by the general secretary of the amount, it was held that the trade union had no legal interest in the result of the slander action, that the payment to the general secretary of the amount of his solicitor's costs was *ultra vires*, and that the general secretary was liable to repay it to the trade union with interest at 4 per cent (q).

The executive council of a trade union invested a part of their funds in a company formed to publish a newspaper to promote the interests of a political party, it was held, that the transaction was not an investment, but a contribution, from which, in the events which happened, no pecuniary return was forthcoming, towards the expenses of publishing a newspaper of definite political views, and that this application of the funds, not being within any of the objects of the trade union as defined by its rules, was *ultra*

(p) *Carter v. United Society of Boilermakers and Iron and Steel Shipbuilders*, (1913) W. N. 334 : 32 T. L. R. 40.

(q) *Oram v. Hutt*, (1912) W. N. 284.

vires, and that the members of the executive council were personally liable to repay the amount of the subscription to the funds of the union (r).

Employees posted a lock-out notice suspending all employees who were members of a certain union, with the exception of a foreman. The union having intimated to its members that the notice must apply to all without exception, a member, who was a foreman, thereupon gave notice to his employers that he would leave their employment in a fortnight in conformity with a rule of the union that such notice must be given by members before leaving situations. During the fortnight he remained at work. Thereafter he was expelled from the union on the ground that he had remained at work during the lock-out, but he was ultimately reinstated subject to a fine of £1, and the loss of all benefits to which he was entitled in respect of his former membership. In an action at his instance for a declaration that the resolution expelling him was *ultra vires* and null and void, and for an interdict to prevent the union enforcing the resolution, it was held, that the action could not be entertained, it being excluded by section 4 (1) of the Trade Union Act, 1871, as it was a proceeding instituted with the object of directly enforcing an agreement between members of a trade union concerning the conditions on which they should be employed, and that the action was also excluded by section 4(3) (a), as being a proceeding instituted with the object of directly enforcing an agreement for the application of the funds of a trade union to provide benefits to members (s).

A branch committee of a trade union had power under their rules to expel any member for conduct bringing the union into discredit. A member of the branch wrote to the head office alleging irregularities on the part of the branch committee. On being required to attend a meeting of the committee, he maintained that he did not intend to cast any reflection on the committee, and offered to write to the head office to that effect. He failed to keep his promise, and ultimately a resolution was passed expelling him from the union. The plaintiff claimed a declaration that the resolution was *ultra vires* and void. It was held that the action of the committee was amply justified under the circumstances, and that the action must be dismissed with costs (t).

Corporations for public purposes—The following corporations were created by the Indian Legislature for specific purposes of public utility.

Under The Town Improvements Acts such as the City of Bombay Improvement Act (Bom. Act IV of 1898) and the Calcutta Improvement Act (Bengal Act V of 1911) Boards of Trustees were constituted for the improvement and expansion of those cities as bodies corporate. The Boards were charged with the carrying out of the objects of the Act, and invested

(r) *Charter v. United Society of Boilermakers*, 85 L. J. (Ch.) 289 : 113 L. T. 1152 ; *Bennett v. National Amalgamated Society of Operative House and Ship Painters and Decorators*, 85 L. J. (Ch.) 298 n. : 113 L. T. 808.

(s) *Smith v. Scottish Typographical Association*, (1919) S. C. 43.

(t) *Wolstenholme v. Amalgamated Musicians' Union*, 89 L. J. (Ch.) 388 : (1920) 2 Ch. 388.

with power of borrowing, acquiring, and disposing of property, and making bye-laws enforceable with penalties.

A Calcutta landlord was tried by the President of the Tribunal appointed under the Calcutta Improvement Act (Beng. Act V of 1911) for cutting off water connection in a tenanted house and was fined. On a rule to set aside the order, it was held that the provisions of section 20 of the Calcutta Rent Act (Beng. Act IV of 1920) were not *ultra vires*, but rule (4) of the rules framed under section 23 of that Act were *ultra vires* (u).

Under The Madras Town Planning Act provision was made for the constitution of 'Board of Trustees' as body corporate to carry out the purposes of the Act. See Madras Act VII of 1920.

Under The Indian Museum Act (V of 1910) a Board of Trustees was constituted as a body corporate with property vested in them and with power to manage the museum and to make bye-laws, to exchange, sell, destroy, &c. articles and collections. Similar provision was made for the Prince of Wales Museum in Bombay by the Prince of Wales Museum Act (v).

The Indian Red Cross Capital Society Act (XV of 1920) constituted the Indian Red Cross Society to provide for the future administration of various monies and gifts received from the public for the purpose of medical aid to the sick and wounded and other purposes of a like nature during the late war. The members of the society were constituted a body corporate with a managing body with powers to make rules of the management, control and procedure of the society. The scope of these rules was defined and the purposes to which the funds may be applied are specified. Under The Medical Acts of various provinces Medical Councils have been constituted for the regulations of medical practice: —See Burma Act I of 1915; Bom. Act II of 1916; Bombay. Act VI of 1912; C. P. Act of 1916; B. & O. Act II of 1916; Punjab Act II of 1916; U. P. Act III of 1917; Madras Act VI of 1914.

The Calcutta Burial Board's Act (Beng. Act V of 1881) was passed for the general management, regulation and control of the burial grounds in the Town of Calcutta and its Suburbs. By that Act a Burial Board was constituted, with powers to receive and expend fees and grants, to appoint and remove overseers, clerks and servants and to make rules for carrying out the purposes of the Act.

Under Bengal Act IV of 1889, a Muhammadan Burial Board was constituted with powers similar to those mentioned in Bengal Act V of 1881.

Under The Elementary Education Acts, educational councils were constituted as bodies corporate with the power to carry out the purpose of the Acts. See Madras Act VIII of 1920; Bom. Primary Education Act I of 1918.

Under Statutes 7 and 8, Geo. V. c. 51 an air council was constituted for the administration of matter relating to the air force and to the defence of the realm by air, and this Act applied to India.

(u) *Goberdone Das v. Doolichand*, 48 Cal. 955.

(v) See Bom. Act III of 1909, as amended by Bom. Act VI of 1921.

Corporation sole.—Among corporations sole, real or *quasi*, must be classed, all those officials in charge of a continuing department of Governmental activities. The Official Assignee and the Official Receiver under the Insolvency Act, the committee of a lunatic under the Lunacy Act, the Administrator-General and the Official Trustee are instances in India. Of these the Official Trustee and the Administrator-General had been expressly declared by the Legislature in Act II of 1913 and Act III of 1913 to be corporations sole with perpetual succession and an official seal, with power to sue and be sued in the corporate name and these Acts prescribe the powers conferred on these officers.

Under The Indian Defence Force Act (II of 1917) and the Auxiliary Force Act (XLIX of 1920) and The Indian Territorial Force Act (XLVIII of 1920), the Commander-in-Chief were given powers to make regulations for purposes specified therein.

Statutes constituting Corporate bodies enacted since after the independence of the Country are many. This Topic will be discussed in the concluding chapter of this series of lectures.

MUNICIPALITIES

The history of municipalities in India goes back to the early days of the East India Company. It is marked by two stages: (1) of chartered, and (2) of statutory municipalities. Madras enjoys the honour of being the oldest municipality in this country. The Kings of England have from very early times exercised the prerogative of conferring corporate rights on towns and boroughs (a). This right could be delegated. In 1689, James II authorised the East India Company to establish a municipality at Madras. In pursuance of this delegated right the Company issued a charter establishing in that place a municipality and a Mayor's Court. It was provided that the new municipality should consist of a Mayor, twelve Aldermen and sixty or more burgesses. The Mayor and the Aldermen could levy taxes to defray the expenses incurred in building a convenient town-house, etc.... "for the greater solemnity and to attract respect and reverence from the common people." The charter provided that the Mayor should always have carried before him when he went to the guildhall or any other public place, two gilt silver maces, and upon such occasions, the Mayor and the Aldermen might "wear scarlet sergegown all made after one form or fashion, such as shall be thought most convenient for the hot country. They were also "to have and for ever enjoy the honour and privilege of having rundelloes and kattysols borne over them when they walk or ride abroad, on these necessary occasions within the limits of the said corporation "

In 1726, a Royal charter was issued re-establishing the municipality of Madras and establishing municipalities at Bombay and Calcutta. It directed "that there shall be, for ever hereafter and within the said town or factory of Madraspatam aforesaid, one body politic and corporate, by the name of Mayor and Aldermen of Madraspatam and that such body politic and corporate shall consist of a Mayor and nine Aldermen...., and that the said body corporate, by name aforesaid, shall have perpetual succession, and shall and may be Person able and capable in law to sue and be sued in any courts and causes whatsoever: and shall and may have a common seal, for the benefits and affairs of the said corporation, which common seal, they and their successors may break and change at their pleasure." Similar provisions were made for the municipalities established in Calcutta and Bombay. It may be noticed in passing that the Mayor and the Aldermen in addition to their municipal functions were given the judicial powers and duties of a Court of Record and of Oyer and Terminer.

(a) See Grant on Corporation pp. 16-18. Halsbury's Laws of England Vol. 8, pp. 314-15.

In 1753, the Company obtained a fresh charter in place of the old one which they surrendered. The new charter, among other things, re-established the municipalities at Madras, Calcutta and Bombay, preserving their old constitutions.

Our modern municipalities, whether in the Presidency towns or elsewhere are all statutory bodies. The municipalities in the three Presidency towns of Calcutta, Bombay and Madras were each governed by a special Act. Modern municipalities in India are statutory bodies.

All other municipalities have been established and were governed by one or other of the District Municipalities' Acts that had been passed for the various provinces of India. As the law on the subject of municipal corporation was almost uniform over the whole of British India, we shall not go into each of the Acts that have been enacted, but shall mainly confine ourselves to the Bengal Municipal Act of 1884 as amended by subsequent enactments.

Before we come to deal with questions relating to matters of municipal administration, we shall briefly discuss the relation of municipal bodies (1) to the Government of this country and (2) to its courts of law. The municipalities, though they are allowed some amount of independence and initiative, are not wholly independent bodies. From their very inception, they were largely controlled by the Local Government. First, in all municipal bodies, the members, commissioners as they are called, were either partly or might be wholly appointed by the Local Government (b); secondly, it could remove any commissioner for misconduct (c); thirdly, it was entitled to call for and inspect their books (d); fourthly, it was authorised to make rules, which had the force of law, intended to control the municipalities (e); fifthly, in some cases, its sanction or confirmation was necessary to complete the act or the transaction (f); and sixthly and lastly, it could dissolve any municipality by superseding the commissioners (g). Relation of municipalities to Government.

We now come to deal with the relation of municipalities to our courts of law. The various Acts of legislature, which have established and are meant to govern municipalities, have charged the latter with the performance of certain duties and invested them with certain powers. In discharging their duties and exercising their powers they must keep within the limits that have been prescribed. The courts in dealing with them treat them, as a rule, more generously than other corporate bodies. For the purpose of enabling them to perform their public duties unimpeded, the courts have placed a more liberal construction on the statutory rights and duties of municipal bodies. But their acts are not outside the jurisdiction of courts of law. In Relation of municipalities to courts of law.

(b) Secs. 14 and 16 of Act III of 1884 (B. C.).

(c) Sec. 19 *ibid.*

(d) Sec. 62 *ibid.*

(e) Secs. 15 and 69 (b) *ibid.*

(f) Secs. 59, 85, 158 *ibid.*

(g) Sec. 65 *ibid.*

a case reported in 19 Weekly Reporter, p. 309. "probably the first case of its kind" one of the defences taken by the defendant municipality was to the effect that the courts had no jurisdiction to interfere with the actions of public bodies. The Calcutta High Court held that "municipal as well as other public bodies are within the restraining jurisdiction of the civil courts which are competent to inquire into and control the actions of public bodies where they have acted in excess or contradiction of the powers conferred upon them." In other words, the doctrine of *Ultra Vires* applies to municipalities as much as to any other corporate body. Even where the decisions of

Doctrines *ultra vires* applies to municipal bodies. municipalities acting in a quasi-judicial capacity in certain matters are declared by the legislature to be final, the courts may inquire whether in coming to their decisions, they acted within their powers in conformity to the provisions prescribed by law. As Mukherji J. puts it: "In these cases it was pointed out that sec. 116 does not take away the jurisdiction of the civil court in a case in which it is alleged and established that the assessment the propriety of which is in controversy is open to objection on the ground that it is *ultra vires*: in other words, it is only when the action of the municipality has been exercised in conformity with the powers conferred upon it by the Act, that the civil court has no authority to interfere. The distinction is well founded on principle. A corporation which is invested with authority to assess taxes, is really invested with a *quasi-judicial* power, and although its action when taken in conformity with the provisions of the law which created the authority may not be liable to challenge in the civil courts, it does not enjoy a similar immunity when that action can be challenged on the ground that it has been taken either in excess of or in contravention of the powers conferred upon it by the statute." (h). It should be borne in mind however that where the municipality while acting within its powers has come to a certain decision, that decision cannot be impugned in a civil court on the ground that it was wrong and should not have been arrived at. The municipality has been authorised by the legislature to decide and act in various matters that have been placed under their charge. A court of law cannot take its place and decide in a particular case what should be done, provided the municipality has come to a decision in conformity with the provisions of law. From this it would follow that all questions of relative necessity, advantage or facility being questions of municipal detail, the civil court will not seek to regulate them by challenging the decisions and acts of municipal bodies.

Thus in *F. W. Duke v. Rameswar Malia* (i). where the defendant contended that the municipality had no power to order the opening of a bustee-road on the ground that such an opening was not necessary, the court held that they could not enter into the question of necessity. In Civil courts have no jurisdiction when municipalities are acting within their powers.

(h) *Chairman of Girdhi Municipality v. Sures Chandra Mozumder*, 12 C.W.N. p. 709. (712). *Corporation of Calcutta v. Royal Calcutta Golf Club*, 68 C.W.N. 877.

(i) I. L. R. 26 Cal. 811

that case, Banerji J. observed as follows: "There can be no doubt that the civil courts have jurisdiction to try the question whether the municipality had been acting within the limit of its statutory power. . . . But then it does not follow that the civil courts have jurisdiction to try the question whether the municipality, when it was acting within the limits of its statutory power, was right in its judgment that a certain road should be opened." This well-known principle of law has been confirmed in a somewhat later case (j) decided by the House of Lords which laid down unanimously the proposition that municipalities must use their statutory powers *bonafide* and reasonably, and if they so act their discretion as to the mode of acting cannot be challenged.

The municipality should then act *bonafide* and reasonably, and above all, in conformity to law, if it wishes to remain outside the jurisdiction of civil courts. An act may be perfectly *bonafide* and yet is liable to be challenged on the ground that it goes *beyond the powers* of the municipal body. The latter may be actuated by the desire to do some public good, as also by the belief that it has the power to do the act in question, "But that does not affect the question before the court, for whatever the motive, it would be the duty of the court to restrain the commissioner if his acts are in excess of his powers" (k).

We now proceed to discuss the constitution of municipal bodies, and their powers and duties. Our treatment of the subject will be somewhat general, avoiding details as far as possible. Our primary object would be, not so much as to give an exhaustive catalogue of the powers and duties of these bodies as to attempt an exposition of the exact nature and extent of these powers and duties in the light of reported cases.

And first as to their constitution: a municipal body in a district town is composed of a number of commissioners and a chairman, elected or appointed, who also enjoys the rights and privileges of a commissioner (l). The number of commissioners in any municipality is fixed by the Local Government, but it may not be more than thirty or less than nine (m). In some municipalities, all the members were appointed by the Local Government (n); in others, a certain proportion of them was elected by male persons residing within the limits of the municipality (o) and having certain pecuniary, educational or professional qualifications, the rest was appointed by the Local Government. The commissioners remained in office for a definite period, e.g. in Bengal for three years from the date of their appointment or election. In some municipalities, the commissioners were entitled to elect

(j) *Mayor, & c. of Westminster v. London & North Western Railway Co.* (1905) A. C. p. 426.

(k) *Chabildas Lalubhai v. Municipal Commissioner of Bombay*, 8 Bom. H. C. Rep. 85 (O. C. J.)

(l) Sec. 24, Act III of 1884 (B. C.)

(m) Sec. 13 *ibid.*

(n) Sec. 17 *ibid.*

(o) Sec. 14 *ibid.*

a chairman from among themselves; in other, he was appointed by the Local Government by name or official designation (*p*). The commissioners were also entitled to elect one of their own number to be vice-chairman (*q*).

The Local Government exercises great control over the Constitution of municipal bodies. It is empowered by the legislature to make rules for the purpose of the election of the commissioners, not inconsistent with the Act and subject to certain provisos (*r*). Secondly, it may, if it thinks fit, on the recommendation of the commissioner, appointed or elected, if such of the commissioners at a meeting remove any commissioner, appointed or elected, if such commissioner has been guilty of misconduct in the discharge of his duties or of any disgraceful conduct (*s*). The wording of the section makes it clear that the Local Government would not be justified in removing a commissioner unless the fact of misconduct has been ascertained, and that if that fact is not proved there is no ground on which the Local Government can exercise its decision. The aggrieved commissioner is entitled to go to the civil court and ask the Local Government to prove the misconduct alleged against him (*t*).

Thirdly, the Commissioner of the Division may remove any commissioner—

(a) if he refuses to act or becomes incapable of acting or is declared insolvent or is convicted of any nonbailable offence; or

(b) if he has been declared by notification to be disqualified for employment in the public service; or.

(c) if he absents himself from six consecutive meetings of the commissioners without having obtained permission from the commissioners at a meeting; or

(d) if, in the judgment of the Commissioner of the Division, to be recorded in writing, he has become disqualified to continue under sec 57 of the Act (*u*).

A right of appeal to the Local Government is given to the commissioners so removed.

Fourthly and lastly, the Local Government, as we have already pointed out, may make an order declaring the commissioners of any municipality to be incompetent, or in default, or to have exceeded or abused their powers and supersede them for a definite period (*v*). When such an order has been made the commissioners shall, as from the date of that order, vacate their office, and all their powers and duties shall be exercised and performed by the Local Government, and all property vested in the commissioners shall vest in the Local Government. The latter shall be in power in place of the

(*p*) Sec. 23 *ibid*

(*q*) Sec. 25 *ibid*

(*r*) Sec. 15 *ibid*.

(*s*) Sec. 19 *ibid*.

(*t*) *Vijaya Ragava v. Secretary of State for India*, I. L. R. 7 Mad. 466.

(*u*) Sec. 20 *ibid*.

(*v*) Sec. 65 *ibid*.

commissioners for the period prescribed in the order, after the expiration of which steps shall be taken for the election or appointment of the commissioners.

For the purpose of enabling municipal bodies to discharge their duties consistently with their powers, the legislature has vested in them certain proprietary rights. Sec. 30 of the Bengal Municipal Act (1884) as subsequently amended enacts as follows:

Proprietary rights of municipalities.

"All roads, including the soils, and all bridges, tanks, ghats, wells, channels, and drains in any municipality (not being private property and not being maintained by Government at the public expense now existing or which shall hereafter be made, and the pavements, stones and other materials thereof, and all the erections, materials, implements and other things provided therefor, shall vest in, and belong to, the commissioners.

"But the Local Government may, from time to time, by notification, exclude any road, bridge, or drain from the operation of this Act or of any specified section of this Act, and may cancel such notification wholly or in part:

"Provided that, if the cost of the construction of the work shall have been paid from the Municipal Fund, such work shall not be excluded from the operation of this Act or of any specified section of this Act without the consent of the Commissioners at a meeting."

There have been numerous decisions in England and in India on the question of the nature of the proprietary right in roads, etc., which are vested in municipal bodies. "The conclusion to be derived from the authorities seems to be this; all the stratum of air above the surface and all the stratum of soil below the surface which, in any reasonable sense, can be required for the purposes of the street, as street, vest and belong to

the local authority" (w). In the section that we have quoted above, the words "including the soil" did not appear in the Act of 1884 but they have been introduced by the amending Act of 1894, (sec. 22). In 1886, in a case against the Municipality of Naihati, it was laid down that the word *roads* comprised only the surface of the roads, without any depth, that it did not include the sub-soil beneath the road, and that the subsoil did not belong to the municipality but belonged to the Zemindar in whose estate the road was situated. It was further decided in that case that the Act was not intended to deprive any person of any private right that he might have in the land used as a public road or to vest that right in the municipality; and that when the land was no longer required for a public road, the owner was entitled to have it (x).

Sub-Soil right.

This decision followed the decision in the English case of *Vestry of St.*

(w) *Finchley Electric Light Company v. Finchley Urban District Council*, L. R. (1903) 1 Ch. 437, at p. 441.

(x) *Chairman of Naihati Municipality v. Kisori Lal Goswami* I. L. R. 13 Cal. 171. See also *Modhu Sudan Kundu v. Promoda Nath Ray*, I. L. R. 20 Cal. 732; *Nihal Chand v. Azmat Ali Khan*, I. L. R. 7 All. p. 362; *Mubarak Shah v. Toofany*, I. L. R. 4 Cal. p. 206.

Mary Newington v. Jacobs, reported in (1872) L. R. 7 Q. B. p. 47. But the interpretation that the judges in this case put on the word "street" corresponding to the word "road" in our Act was found to be too narrow, and accordingly in 1878, in the well-known case of *Coverdale v. Charlton* (y) the courts put a somewhat larger interpretation so as to include not only the bare surface of the street (or road) but also as much depth below the surface as it was essential to the making, maintenance, occupation and exclusive possession of the street for the use of the public, and as the municipality might require for the doing of all those things that are commonly done to or under the streets (or roads).

The Amending Act of 1894 incorporated this interpretation of the word "street" by introducing the words "including the soil." In a case decided by the Madras High Court in 1901, the amendment was recognised and given effect to, and the Indian law on the point was brought into tune with English decision (z). At present it is quite clear that under the Act, the municipality enjoys a right in the subsoil of the road, etc., vested in them, not of course down to the middle of the earth, but in as much of it as is necessary for carrying out the purposes of the Act.

There is another question which had arisen in this connection, viz. whether the municipality is vested not only with the subsoil, but also with the column of space over the roads. *Coverdale v. Charlton* (a) decided that the word "street" probably meant and included not merely the surface but so much above it also as was requisite or appropriate for the preservation of the road and for the usual and intended purposes. This view has been followed here. In *Nagar Valab Narsi v. Municipality of Dhandhuka* (b), the Bombay High Court decided that if the column of space standing over the street were occupied by projectors, the interception of air and light could greatly impair the use of the street as street and that so far therefore the column of space is vested as part of its property in the municipality.

Having determined the extent of the proprietary right of municipal bodies in roads etc., we shall now proceed to determine the precise nature of this right. The section we have quoted says all roads etc., "shall vest in and belong to the Commissioner." Does this confer the absolute right of ownership on municipal bodies? It was contended in *R. v. Brojo Nath De* (c), which was decided in 1877 under sec. 10 of Bengal Act. III of 1864, where the same words as above occur, that since public highways became vested in and belonged to the commissioners, the latter could dispose

(y) (1878) L. R. 4 Q. B. D. 104.

See also *Burgess v. Northwich Local Board*, 6 Q. B. D. 264.

Wandsworth Board of Works v. United Telephone Co., 13 Q. B. D. 904. *R. v. Kippers etc. of Country of London etc.*, 25 Q. B. D. 362, *Finchley Electric Light Company v. Finchley Urban District Council*, L. R. (1903) 1 Ch. 437.

(z) *S. Sundaram Aiyar v. The Madura Municipal Council*, I. L. R. 25 Mad. P. 635.

(a) (1878) L. R. 4 Q. B. D. 104.

(b) I. L. R. 12 Bom. p. 490.

(c) I. L. R. 2 Cal. 425.

of this property in any way they pleased, provided they did so for the purposes of the Act. The High Court of Calcutta overruled the contention and held that the municipal commissioners did not have any such large power and that neither they nor a *fortiori* their vice-chairman could stop up or divert public highways.

This view is in conformity with the decisions of English courts. In the case of *Coverdale v. Charlton*, (d) the broad proposition of law was laid down viz. "The Boards' property in the street is not general property or a species of property known to English common law, but is a special property created by statute and vested in the Board for public purposes and it is limited by reference to the period during which the street is used for the particular purpose of a highway and that period ceases when that purpose has ceased."

The question as regards the nature and extent of the proprietary rights of public bodies was gone into at some length in the Madras case which we have just referred to. Bhashyam Ayyangar J. after having discussed the leading cases in England and India summed up his views as follows: "The conclusion to be drawn from the English case-law is that what is vested in urban authorities under statutes similar to the District Municipalities' Act is not the land over which the street is formed, but the street *qua* street, and that the property in the street thus created in a municipal council is not general property or a species of property known to the common law, but a special property vested by statute and vested in a corporate body for public purposes, that such property as it has in the street continues only so long as the street is a highway and that when it ceases to be a high way by being excluded by notification of Government under sec. 23 of Act. II of 1884, or by being legally stopped up or diverted or by the operation of limitation (assuming that by such an operation, the highway can be extinguished) the interest of the corporate body determines, and that the clauses, directing or authorising the corporate body to sell have reference only to property absolutely vested in it, but as to property in which its interest ceases it has nothing to sell" (e)

Besides the properties which are vested in a municipal body by the operation of the Act, it may, for the purposes of the Act, acquire landed properties, freehold or leasehold, by agreement with private owners (f). It may also make a compulsory purchase of land through the Local Government acting under the provisions of the Land Acquisition Act, 1894 (g). Such purchase must be for the purposes of the Act; otherwise, the municipality may be restrained by an injunction from paying for the land in question out of its funds. The declaration made by the Local Government under sec. 6 of the Land Acquisition Act, 1894 to the effect that the land going to be ac-

(d) (1878) L. R. 4 Q. B. D. 104.

(e) *S. Sundaram Aiyar v. The Madura Municipal Council*. I. L. R. 25 Mad. 635 at p. 647.

(f) Sec. 34, Act III of 1884 (B. C.).

(g) See 35 *ibid.*

Power of municipal
bodies to acquire lands.

quired is needed for a public purpose is conclusive evidence that the land was really needed for such purpose. But this does not in a suit brought against the municipality for restraining it from paying for the land out of its funds oust the jurisdiction of the civil courts to enquire whether it is really needed for the purposes of the Act. The courts, however, will not interfere with the discretion of the municipality in deciding whether the acquisition of the land in question is needed for the purposes of the Act, if it has acted properly and reasonably (h).

A public purpose would include any purpose in which even a fraction of the community may be interested or by which it may be benefited (i). But a public purpose is bound to vary with the times and the prevailing conditions in a given locality, and therefore, it would not be a practical proposition even to attempt a comprehensive definition of it (j). If the Government's declaration is conclusive and no action of the Government is colourable then no question would arise as to whether the purposes of acquisition fall within the expression public purpose. The Land Acquisition Act, 1894 is a pre-Constitution law and it is protected from the operation of Art 31(2) of the Constitution and any attack on this Statute under Art. 19 is futile. This is more so when the right to property has been removed from the category of fundamental rights (k).

Besides these landed properties, the legislature has vested in municipalities certain funds. Sec. 67 of the Bengal Municipal Act, (III of 1884) enacted as follows :-

The municipality, it is clear, holds its funds and properties in trust for the purposes of the Act. Accordingly it cannot employ the same or proceeds of the same for any purpose not contemplated by the Act.

"All sums received by the Commissioners, and all fines paid or levied in any municipality under this Act, and all other sums which, under the sanction of Government, may be transferred to the Commissioners, shall constitute a fund which shall be called the Municipal Fund, and shall, together with all property of every nature or kind whatsoever, which may become vested in the Commissioners, be under their control and shall be held by them in trust for the purposes of this Act."

The municipality, it is clear, holds its funds and properties in trust for the purposes of the Act. Accordingly it cannot employ the same or proceeds of the same for any purpose not contemplated by the Act. As we have already seen in the case last cited, the civil courts will not seek to interfere with the discretion of the municipality in deciding what is necessary for the purposes of the Act. "All questions of relative necessity, advantage, or

(h) *Sastri Ram Chandra v. The Ahmedahad Municipality*, I. L. R. 24 Bom. p. 600, per Ranade J. at p. 604 & at p. 606.

(i) *Babu Barkya Thakar v. State of Bombay*, 1961 (1) S. C. R. 128.

(j) *Somawanti v. State of Punjab*, 1963, (1) S. C. A. 548.

(k) See *Babu Barkya*, *ibid*, *State of Bombay v. Bhanji Munfi.*, 1955 (1) S. C. R. 7778. *Lilavati Bai v. State of Bombay*, 1957 S. C. R. 721.

facility are questions of municipal detail, and it is not within the province of a Civil Court to regulate their details (l)".

But in a case of clear misapplication of funds, the court may stop it by an injunction. Thus in *Vaman Tatyaji v. Municipality of Sholapur (m)*, it was held that the municipal funds could not be employed for the purpose of keeping a band, and accordingly an injunction was granted restraining the municipality from employing its funds for such purpose.

The power to enter into contracts is one of the common law incidents of corporate bodies. Our municipalities enjoy this Power of municipal power under certain statutory restrictions. Sec. 37 bodies to enter into of the Act enacted as follows: contracts.

"The Commissioners may enter into and perform any contract necessary for the purposes of this Act."

"Every contract made on behalf of the Commissioners of a municipality in respect of any sum exceeding five hundred rupees or which shall involve a value exceeding five hundred rupees, shall be sanctioned by the Commissioners at meeting, and shall be in writing and signed by at least two of the Commissioners, one of whom shall be the Chairman or Vice-Chairman, and shall be sealed with the common seal of the Commissioners."

"Unless so executed, such contract shall not be binding on the Commissioners."

The section lays down, first, that the contracts entered into by municipal bodies must be necessary for the purposes of the Act; otherwise, they would be *ultra vires*. Secondly, that contracts in respect of any sum exceeding five hundred rupees, or which will involve a value exceeding five hundred rupees shall be accompanied by certain formalities. Our courts, following English decisions, have construed these formalities as imperative and have required substantial compliance with them. In the absence of such compliance the contract is void. The courts have gone so far as to exempt the municipality from any liability whatsoever, even in respect of what has been done under the contract, on the ground that the provisions laid down by the legislature have not been observed. Thus in *Radhakissen Das v. The Municipal Board of Benares (n)*, the court held that where a contract had not

(l) *Sastri Ram Chandra v. The Ahmedabad Municipality*. L. L. R. 24 Bom. p. 600 at p. 606.

(m) I. L. R. 22 Bom. 646.
See also *Attorney-General v. Aspinall*, 2 My. & Cr. 613; *Attorney-General v. Mayor of Poole*, 4 My. & Cr. 17.

(n) *Radhakissen Das v. The Municipal Board of Benares*, I. L. R. 27 All. p. 592.
See also *Ramaswam Chetti v. The Municipal Council of Tanjore*, L. L. R. 29 Mad. 360.

Ahmedabad Municipality v. Submanji, I. L. R. 27 Bom. 618. *Chairman South Barrackpore Municipality v. Amulyanath Chatterji*, I. L. R. 34 Cal. 1030.

But see *Abaji Sitaram v. Trimbuk Municipality*, I. L. R. 28 Bom. 66, when Jenkins C. J. observes that in a case of executed consideration, action will lie through the formality of sealing has not been observed.

See also the following English cases:

Young & Co. v. Mayor of Royal Limington Spa L. R. 8 Q. B. D. 579 (1883)
L. R. 8 App. Cas. 517.

British Insulated Wire Company Ltd. v. The Prescott Urban District Council, (189.5) L. R. Q. B. 634.

been entered into in the manner provided by the legislature, no suit could be maintained in respect thereof, even though there had been part performance of the contract and the plaintiff was claiming merely for the value of work done and of materials supplied, notwithstanding the provisions of sections 65, 70 and 72 of the Indian Contract Act.

Of the many powers that have been conferred on municipal bodies, the most important, as well as the most formidable, is power to tax those who are within their jurisdiction.

Power of municipal bodies to impose taxes.

We have already seen that the charter of the East India Company establishing the municipality at Madras authorised the Mayor and Aldermen to levy taxes for certain purposes. Our modern municipalities are vested with a similar power by the legislature which has to be exercised under certain restrictions.

The power to levy rates, taxes, tolls, customs, etc. from the king's subjects was not one of the ordinary incidents of corporate bodies. Whatever may be the powers individually possessed by corporations which exist at common law, or by prescription or implication, there is no doubt that statutory corporations can exercise no such power as levying of rates and taxes, etc., unless authorised by statute to do so; and that "if a corporation established by Parliament is empowered by statute to impose certain tolls upon those who make use of its property, etc., it cannot impose any further tax upon them and claim anything beyond that which the statute empowers it to claim (o)".

Section 85 and 86 enacted as follows:

"The Commissioners may, from time to time, at a meeting convened expressly for the purpose, of which due notice shall have been given, and with the sanction of the Local Government, impose, within the limits of the municipality, one or other or both of the following taxes:

(a) a tax upon persons occupying holdings within the municipality according to their circumstances and property within the municipality:

Provided that the amount assessed upon any person in respect of the occupation of any holding shall not be more than eighty-four rupees per annum; or

(b) a rate on the annual value of holdings situated within the municipality;

Provided that such rate shall not exceed seven and a half per centum on the annual value of such holdings, except within the municipalities of Howrah, Patna, Dacca, and Darjeeling, in which it shall not exceed ten per centum of such annual value; and provided also that no rate shall be imposed on any holding of which the annual value is less than six rupees:

Provided that both the taxes shall not be in force at the same time in the same ward."

"The Commissioners may, from time to time at a meeting convened as aforesaid, and with the sanction of the Local Government order that the

(o) Grant on "The Law of Corporations" p. 7.

following tax, fee, tolls, and rates, or any of them, be levied within the limits of the municipality in addition to either of the taxes mentioned in the last preceding section—

(a) a tax on carriage, horses and other animals named in the fifth schedule:

(b) a fee on the registration of carts;

(c) tolls on ferries and (subject to the provisions of sections 158 and 159) tolls upon bridges and metalled roads;

(d) a water-rate not exceeding seven and a half per centum on the annual value of holdings when the houses and lands are situated in streets supplied with water, and not exceeding six per centum when the houses and lands are situated in streets not so supplied;

(e) a lighting rate not exceeding three per centum on such annual value;

(f) a fee for the cleansing of latrines;

Provided that the taxes mentioned in clauses (d), (e) and (f) shall not be levied in any municipality unless the provisions of part VII in respect of clause (d) or of Part VIII in respect of clause (e), or of Part IX in respect of Clause (f), shall have been extended, wholly or partly, to such municipality in the manner hereinafter provided."

The sections empowered the commissioners (1) to levy a tax on occupiers of holdings within the municipality according to their circumstances and property within the municipality; (2) to levy a rate on the annual value of holdings within the municipality; and (3) to levy certain taxes, fees and tolls on carriages, horses, carts, bridges, etc., and certain rates to defray the expenses of water and light supply. Their power, it should be observed, was to be exercised subject to the sanction of the Local Government and to the provisos, already mentioned, as also strictly in conformity with the procedure laid down. It is a well established principle that in construing these provisions which invest the commissioners with power to tax the subject, the courts will scrutinise them most closely and construe them with the utmost strictness (p). In levying any rates, taxes, etc., the commissioners are bound to observe the necessary formalities. Where there has been any omission, the tax is illegal and no one is bound to pay it. This was laid down in *Leman v. Damodaraya* (q). The Act of its own force creates neither any taxes nor any tax-payers, but provides that if the proper measures are taken, both may come into existence, and empowers the Commisoiners to take these measures. There is no provision for taxing at all otherwise than by pre-prescribing the machinery. If it does not exist, there can be no tax at all; nor unless it is applied can there be any debt due from any person.

This has been followed in *Joshi Kalidas Sevakram v. The Dakor Town Municipality* (r). In this case, the municipality, under the powers conferred

(p) See *Dwarka Nath Dutt v. Addya Sundari Mitra and others*, I. L. R. 21 Cal. 319, per Beverley J. at p. 325.

(q) I. L. R. 1 Mad. 158.

(r) I. L. R. 7 Bom. 309.

The Municipality of Sholapur v. Sholapur Spinning and Weaving Co., I. L. R. 20 Bom. 732.

upon them by Bombay Act VI of 1873, convened a meeting at which it was resolved to impose a house-tax. Notice of the meeting was not served on three of the commissioners and no notice specifying the business to be transacted therein was posted up at the *Kachari* as required by sec II, cl. I of the Act. The plaintiff sent a notice to the municipality impeaching the legality of the tax. He paid the tax and then sued for a refund. It was held that the provisions of sec. II, cl. I, as to notice of meeting were not directory, but obligatory, and that notice to all the commissioners of the meeting at which the taxing resolution was passed being a material part of the machinery provided by the Act for imposing a legal tax was a condition precedent to the validity of that tax. The tax was consequently declared illegal, notwithstanding that the tax had been sanctioned by the Local Government.

But it is for the person who alleges illegality to prove that the regular procedure for imposing a tax has not been followed. In the absence of such proof the court will presume that the municipality has used the regular procedure and that the common course of business has been followed in the case in question.

Along with the power of taxation, the municipality possessed certain powers of a *quasi-judicial* character which authorised it to determine the amount of tax etc., that may be levied in a particular case (s). The Act makes the decisions of the municipality on questions of assessment final, except in regard to certain matters which we shall notice presently where the civil court is entitled to interfere and set aside the assessment made by the municipal authorities. Sections 113-116 provided as follows:

“Any person who is dissatisfied with the amount assessed upon him or with the valuation or rating of any holding, or who disputes his occupation of any holding or his liability to be assessed or rated, may apply to the Commissioners to review the amount of assessment, valuation, or rating or to exempt him from the assessment or rate (t).

“Every application presented under the last preceding section shall be heard and determined by not less than three Commissioners, who shall be appointed in that behalf by the Commissioners at a meeting. The Commissioners so appointed, after taking such evidence and making such enquiries as they may deem necessary, may pass such order as they shall think fit in respect of such application.

“The decision of such Commissioners, or of a majority thereof, in such cases shall be final” (u).

“Unless good cause shall be shown to the satisfaction of such Commissioners for extending the time allowed, and save as is otherwise expressly provided in this Act, no such application shall be received after

(s) See 87 to 115, Bengal Act III of 1884.

(t) Sec. 113, *ibid.*

(u) Sec. 114, *ibid.*

the expiration of one month from the date of publication of the notice required by section 112 relating to the list containing the assessment, valuation or rating in respect of which the application is made, or after the expiration of fifteen days from the date of service of the first notice of demand for payment at the rate in respect of which the application is made, whichever period shall last expire (v).

"No objection shall be taken to any assessment or rating in any other manner than in this Act is provided (w)

There has been a large number of decisions on the subject of the powers of assessment, valuation and rating possessed by municipal bodies and on the jurisdiction of civil courts to inquire into their validity. The law on this point has been throughout uniform and consistent. It may be enunciated thus: a civil court is bound to accept as conclusive the assessment, valuation or rating made by the municipality, being the only authority on whom the power of making the assessment etc., has been placed by law and cannot substitute for that assessment etc., one made by itself; and further it ought not to interfere with the municipal assessment etc., unless the rules prescribed by the law for making the assessment etc., have been broken or unless there has been *malafides* or manifest error (x). The question now is, what are the circumstances in which the civil court is entitled to interfere with the decisions of municipal bodies on questions of assessment, valuation or rating. They are—

Jurisdiction of civil courts to inquire into matters of assessment, valuation, rating etc.

- (1) where there is no legal tax to pay;
- (2) where there is no liability to pay;
- (3) where the assessment, valuation or rating has been made on wrong basis or principle.

We have already considered this point in the two cases we have cited—*Leman v. Damodaraya* (y) and *Joshi Kalidas Sevakaram v. Dakor Town Municipality* (z). The Act by itself does not create any tax but it authorises the commissioners to levy a tax by taking certain measures. If they fail to take the necessary measures and yet proceed to levy, any person can refuse to pay on the ground that there is no legal tax to pay. Where the refusal is made on this ground, the court as we have seen, is entitled to enquire into the validity of the tax and on being satisfied that the tax is not validly imposed, may set aside the assessment or valuation or rating.

Where there is no legal tax to pay.

The courts have always distinguished between two questions, first, the question as regards the *amount* of assessment, rating or valuation and

(v) Sec. 115, *ibid.*

(w) Sec. 116, *ibid.*

(x) See *Morar v. Borsad Municipality*, I. L. R. 24 Bom. 607.
Kasandas Raghunathdas v. Ankleshvar Municipality, I. L. R. 26 Bom. 294.
Manessure Das v. Municipality of Chapra, I. L. R. 1 Cal. 409.

(y) I. L. R. 1 Mad. 158.

(z) I. L. R. 7 Bom. 399.

secondly, the question as regards the *liability* to pay. When the person assessed disputes the *amount* of the assessment, valuation or rating, he has no other remedy except what is provided by sections 113-115 of the Act. But where the person assessed disputes his *liability* to pay, then notwithstanding the above mentioned sections and sec. 116, the court will inquire into the question of his liability. The municipality cannot get hold of any person they please and assess him, and then plead under section 116 of the Act want of jurisdiction of the civil court to question its conduct. As the section was originally framed it was somewhat ambiguous and was as follows: "No objection shall be taken to any assessment or rating, nor shall the liability of any person to be assessed or rated questioned in any other manner or by any other authority than in this Act is provided." On the strength of this section, the Municipality of Barisal contended that the civil court had no jurisdiction to question the assessment of the municipality, even though the allegation was that the person assessed was not liable to pay, as he did not occupy any holding in the municipality within the meaning of sec. 85 of the Act. Beverley J. overruled the contention on the ground that the word "liability" in sec. 116 had no application to a dispute as to whether a person assessed to a tax did or did not occupy a holding and held that a suit brought to set aside an assessment on the ground that the person assessed did not occupy a holding was not barred by the provisions of sec. 116 (a).

Since this decision, the section has been amended by leaving out the words, "nor shall the liability of any person to be assessed or rated be questioned".... "or by any other authority.". The section as it stands now makes it absolutely clear that the civil court has jurisdiction to entertain suits to set aside a municipal assessment on the ground that the person assessed is not liable to pay and to set aside the assessment, if the ground has been made out.

Thus, in *Tuticorn Minicipality v. South Indian Railway (b)*, where a tax was levied upon a person who was entitled to exemption under the Act, it was held that a suit to set aside the assessment would lie. Similarly in *Corporation of Calcutta v. Standard Marine Insurance Co. (c)*, where the company had been taxed under sec. 87 of the Act, it was held that they were not liable to be taxed as they did not have any place of business within the limits of the Calcutta Municipality but carried on business by their agent at the offices of the latter.

We have said that the civil court will not challenge a municipal assessment, valuation or rating where the dispute is one as regards the *amount*. But even here the court will entertain a suit if the complaint is that the amount assessed has been worked out on a wrong basis or principle not

(a) I. L. R. 21 Cal. 319 at p. 327.

(b) I. L. R. 13 Mad. 78

(c) I. L. R. 22 Cal 581.

authorised by the Act. This was laid down by the Calcutta High Court in the case of *Nando Lal Bose v. Corporation of Calcutta* (d), and followed ever since. There the plaintiffs' house was assessed on a wrong basis Chief Justice Garth held that "the authority of this Court to remove the proceedings of inferior courts in the exercise of their judicial function is unlimited.....if the commissioners were exceeding the jurisdiction in making the assessment it seems clear that we have the power to quash it upon *certiorari*, in spite of sec. 17 in the Calcutta Municipal Corporation Act, 1876."

The two important cases which have settled the law on this point are *Navadwip Chandra Pal v. Purnananda Saha* (e) and *Kameswar Prosad v. Bhabua Municipality* (f). In the former case, the municipality had split up one holding with one assessment into two holdings with two assessments and thus claimed a larger amount than was legally due. It was held that the assessment was *ultra vires* and was not binding. In the latter case of *Kameswar Prasad* the commissioners purporting to act under sec. 85 had assessed a person upon his property and circumstances not only within the limits of the municipality but also outside those limits. The assessment was set aside as *ultra vires* and illegal.

The question as to the jurisdiction of the civil court to challenge municipal assessment was discussed at some length by Mukherji J. in the well-known case of *The Chairman of the Giridih Municipality v. Srish Chandra Majumder* (g). The learned judge, after having gone through English, American and Indian decisions, summed up his conclusions as follows:

"It has been repeatedly ruled that errors in assessment which constitute irregularities merely and do not go to the ground-work of the tax and render the assessment void, can be corrected only in the manner provided by statute which creates the authority and the remedy so provided must be treated as exclusive. On the other hand where the defects in assessment are jurisdictional, rendering them void, the persons aggrieved thereby are entitled to invoke the ordinary judicial remedy, and all clear violations of law give rise to jurisdictional question. In other words, while mere erroneous exercise of judgment is not reviewable by the civil court, any excess of jurisdiction makes the act liable to challenge."

To make the law on this point still clearer we shall now give a number of cases where the decision of the municipal authority has been held conclusive and not liable to be challenged in a civil court.

We now come to deal with the various statutory powers which have been conferred on municipal bodies for the purpose of enabling them to take measures of improvement, sanitation and conservancy within the areas under their control. Various other statutory powers conferred on municipalities. Generally speaking these powers are of a discretionary

(d) I. L. R. 11 Cal. 275 at p. 278.

(e) 3 C. W. N. 73.

(f) I. L. R. 27 Cal. 849.

(g) I. L. R. 35 Cal. 859; S. C. 12 C. W. N. 709.

character. The municipality is vested with a discretion as to whether it should exercise any of its powers in a particular case. It may be responsible to the Local Government for its failure to exercise its powers for public benefit. But it is not responsible to any private person for any such failure, even if the latter has been put to any loss thereby. Thus under the old section 339 of the Bengal Municipal Act, 1884, the district municipality had an absolute discretion in the matter of granting licenses to the owners of markets. The section ran as follows:

"Every licence granted under this part shall be liable to the payment of a fee not exceeding twenty rupees, and shall be in force untill the end of the year, and the commissioners may grant such licence, year by year, on the certificate in writing, under the hand of the chairman, annually renewed, that the land is fit to be used as a market for the sale of provisions as aforesaid."

The section came up for construction in *Maran v. The Chairman of Motihary Municipality* (h). There the municipality had by refusing sanction put an end to an already existing market to the profit of a market established by itself. Pigott, J., held that "it is within the discretion of the commissioners to grant or refuse a license," and that the Act afforded no remedy to aggrieved persons. The decision was followed in a similar case which came up before Princep and Amir Ali JJ. Both the Judges were of opinion "that it is entirely within the discretion of the municipal commissioners to grant or refuse a license and courts have no longer a jurisdiction to control such power, however arbitrarily exercised (i).

Since these decisions, the Amending Act of 1894, sec. 91, has introduced after the words and the commissioners" in the section 339 as quoted above the following clause for the purpose of safe-guarding the rights of the owners of already existing markets

"Shall as regards markets lawfully established at the time of the extension of this part to the municipality, and in all other cases."

Under the section as it thus stood, the municipal authorities were bound to grant a license to the owner of an already existing market, provided the necessary certificate was forthcoming, but could exercise their discretion as regards other kinds of markets.

Secondly, municipalities enjoy a discretion as to how they should exercise their powers. The legislature has entrusted them with certain duties to be discharged consistently with certain prescribed powers. So long as they keep within their powers, they are the sole judges of how they should perform their duties. The civil court will not take the place of a public body and dictate to it how it should discharge its obligations to the public. As we have already seen, all questions of relative necessity, advantage or facility are questions of municipal detail and the civil court will not seek to regulate them by challenging the decisions and acts of municipal bodies. Provided the municipality act *bonafide* and reasonably, the courts will not

(h) I. L. R. 17 Cal. 329.

(i) *R. v. Mukhunda Chandra Chatterji*, I. L. R. 20 Cal. 654.

interfere. This principle has been established by a series of decisions, English and Indian.

Thus in *Duke of Bedford v. Dawson* (g), Jessel M. R. while construing the expression "for the purpose" observed as follows: "This means that when the words 'for the purpose' are used, that does not imply what the plaintiff or some one else think the purpose, or what the court may think is the purpose, but it means what the public body entrusted with the power by the legislature may in their honest and reasonable exercise of judgment think necessary for the purpose. They are to be the judges, subject to this, that if they are manifestly abusing their powers, and purporting to use the law for a purpose for which manifestly it is not intended, the court will say it is not a fair and honest judgement and will not allow it."

Similarly, in a somewhat later case (k) which we have already cited, the House of Lords laid down the principle that if municipalities use their statutory powers *bonafide* and reasonably their action as to the *mode* of acting cannot be challenged. In that case, Lord Lindley, J., observed as follows: "Matters of detail, of taste, and of expense in executing works authorised by statute are left to the constructing authority; and their decision on such matters is not open to review in an action for an injunction unless the court is of opinion that the statutory authority is a mere cloak to screen an unauthorised work".

In this country there have been a large number of cases where the exercise of powers of municipal bodies has been challenged by private persons but upheld by the court on the basis of the principles enunciated above.

Section 175 of the Bengal Municipal Act, 1884, authorised the commissioners to require owners or occupiers of any land to do anything to it or to execute any work in respect of it, provided the cost does not exceed the sum of Rs. 300. If the work is not done within the time specified in the requisition, the commissioners, under section 180 of the Act, may enter upon the land and "perform all necessary acts for the execution of work or doing of the thing required." It was held in *Re Joges Chandra Dutt* (l), that under the section the municipality has a discretion both as to the objects upon which they should proceed and as to the manner in which they should proceed and as to the manner in which they should do so.

Similarly in *F. W. Duke v. Rameswar Malia* (m), where the defendants contended that the municipality had no power to order the opening of a bustee-road on the ground that such an opening was not necessary, the court held that it had no jurisdiction to try the question whether the municipality, when it was acting within the limits of its statutory power, was right in its judgment whether a certain road should be opened.

We shall notice one more case, viz., *Patel Panachand Girdhar v.*

(j) L. R. 20 Exch. 383.

(k) *Mayor etc. of Westminster v. L. & N. W. Ry. Co.*, L. R. (1905) A. C. 426.

(l) 16 W. R. p. 285

(m) I. L. R. 26 Cal. 811.

Ahmedabad Municipality (n), which was decided by the Bombay High Court. There the question raised was whether the removal of a particular building was required for the purpose of public convenience. The court held that "the legislature has confided to the municipality, and the municipality alone, the duty of deciding what measures within its legal powers are for the public convenience, and its discretion is not subject to control by the courts."

Thirdly and lastly, it is an established principle of law that municipal corporations will be allowed in the exercise of their powers, a much greater freedom than will be accorded to ordinary commercial corporations under similar circumstances. This was clearly enunciated in the well known case of *Galloway v. Mayor, etc., of London (o)*, and has been followed ever since in England and in this country. Following this case the Bombay High Court laid down the principle in *Ollivant v. Rahimtula Nur Mahomed (p)* that "where an Act gives power to a municipality or corporation for the public benefit, a more liberal construction should be given to it than where powers are to be exercised for private gain or other advantages." In that case, the eaves of two of the plaintiffs' buildings projected two feet over the street and descended to about two feet and nine feet respectively above the level of the roadway. The municipality ordered the plaintiff to remove the eaves as constituting an obstruction within the meaning of section 195 of Act III of 1872 and Act IV of 1878. It was held that for the eaves to constitute an obstruction within the meaning of the section, it is not necessary that there should be a real practical inconvenience to the public traffic in the street. Traffic along the street means traffic along the whole of the street, and the eaves were considered to constitute an obstruction to traffic in the part of the street over which they projected.

Here the municipality had the power to order the removal of obstructions to traffic in the street. The court decided that that power could be exercised, when there was some obstruction, even though the obstruction did not cause real practical inconvenience to the public traffic in the street.

Not only would the powers of municipal bodies be construed more liberally by the court than those of private corporations, but the proceedings of the former will be criticised less rigorously than those of the latter. Thus in the case of *Lord H. Ulick Browne v. Womesh Chandra Roy (q)*, where the municipal authorities, acting under Sec. 73 of the Bengal Municipal

(n) I. L. R. 22 Bom. 230 at p. 233.

See also *Nagar Valab Narsi v. Municipality of Dhandhuka*, I. L. R. 12 Bom. 490.
Ahmedabad Municipality v. Manilal Udenath, I. L. R. 19 Bom. 212.
Municipal Commissioners for the city of Madras v. Parthasaradi, I. L. R. 11 Mad. 341.

(o) L. R. 1 Eng. and Ir. App. 34.

(p) I. L. R. 12 Bom. 474.

See also *Quinton v. Corporation of Bristol*, L. R. 17 Eq. 524. Brice on Ultra Vires, p. 16.

See also *Bagshaw v. Buxton Local Board of Health*, L. R. 1 Ch. D. 220 at pp. 223, 224.

(q) (1867) 7 W. R. 213.

Act 1864 (*r*), had entered upon the defendant's land and cleared away the jungle growing on it, it was held that they were entitled to do so on the report of their medical officers and that they were not bound like a judicial officer to summon each individual and to sit and hear evidence on both sides in the presence of the parties concerned and further that they were not bound to inspect each particular spot of land personally and individually and to ascertain by evidence whether the jungle growing there was injurious to the health of the neighbourhood or not.

We shall now consider powers of a *quasi*-legislative character which have been conferred on municipalities. They relate to the making of rules and bye-laws. A municipal body as also other corporate bodies have, in common law, the power of making bye-laws. But there is this important difference between the bye-laws of municipal corporations and those of nonmunicipal corporations, viz., the bye-laws of the latter are obligatory on its members only, but those of the former are obligatory upon all the inhabitants of a district over which they have jurisdiction (*s*). In this country, the power of making bye-laws has been specially conferred by legislation. Sections 350 and 351 of the Bengal Municipal Act, 1884, enact as follows:

"The Commissioners of any municipality may, from time to time, at a meeting which shall have been convened expressly for the purpose, and of which due notice shall have been given, frame such bye-laws as they deem fit, not being inconsistent with this Act or with any other general or special law for—

- (a) regulating traffic, and for prevention of obstructions and encroachments, and of nuisance on or near the roads;
 - (aa) prohibiting the letting-off firearms, fire-works, fire-balloons or bombs, except (*i*) with the permission of the commissioners or a member of the Ward Committee or a municipal officer empowered by the commissioners in this behalf, and (*ii*) on payment of fees at such rates as may be sanctioned by the commissioners at a meeting;
 - (b) regulating the use of, and the prevention of nuisances in regard to public water-supply, bathing and washing places, streams, channels, tanks and wells;
 - (c) regulating the disposal of sewage, offensive matter, carcasses of animals, and rubbish, and the management of privies, drains, cess-pools and sewers;
 - (d) regulating cremations and burials and the disposal of corpses;
 - (e) preventing nuisances affecting the public health, safety or convenience; and
 - (f) giving effect to the objects of this Act;
- and may, be such bye-laws impose on offenders against the same

(*r*) This corresponds to sec. 180 of the Bengal Municipal Act of 1884.

(*s*) See Grant on Corporations, p. 77.

such reasonable penalties as they think fit, not exceeding the sum of fifty rupees for each offence.

and, in case of a continuing offence a further penalty not exceeding twenty rupees for each day after written notice of the offence from the commissioners.

Bye-laws made under this Act shall not take effect unless and until they have been submitted to, and confirmed by the Local Government, nor shall such bye-laws be confirmed—

unless one month at least before the making of the application, notice of the intention to apply for confirmation has been given in one or more of the local newspapers circulated within the municipality to which such bye-laws relate, or if there be no such newspapers, then in such manner as the commissioners may direct; and unless, for one month at least before any such application, a copy of the proposed bye-laws has been kept at the office of the commissioners, and has been kept open during the office hours thereof to the inspection of the inhabitants of the municipality to which such bye-laws relate, without fee or reward.

The Local Government may cancel its confirmation of any such bye-law, and thereupon the bye-law shall cease to have effect.”

It follows from the general principles of the doctrine of *ultra vires* that municipalities in this country could make bye-laws only in regard to matters specified above, as also in the manner prescribed. The bye-laws to be valid must keep within the limits imposed by the legislature. No doubt, the courts as a rule deal with them more generously than with private corporations. But this will not protect them from the interference of the courts of law if their bye-laws manifestly go beyond the prescribed limits (r).

Sec. 350 enacts that “the commissioners may frame such bye-laws not being inconsistent with this Act or with any other general or special law.” Bye-laws are inconsistent only if they alter and thereby contradict the Act, and in determining this, the object and policy of the whole Act must be considered (u). Further, bye-laws must not be inconsistent with any other general or special law in force in this country. This prevents municipalities from making bye-laws, the effect of which would be to make that lawful which is by general or some special law unlawful or that unlawful which the general law or some special law declares to be lawful (v). But this does not prevent them from creating new offences (w).

Beside laying down certain limitations the legislature has prescribed a certain procedure to be followed by municipalities in making bye-laws.

(r) *Chairman of Howrah Municipality v. Montance Bewah*, 24 W. R. Cr. 70.

Corporation of Calcutta v. Jadav Dooly, I. L. R. 20 Cal. 605.

Municipality of Bombay v. Sunderjee, I. L. R. 22 Bom. 980.

Tribhovan v. Ahmedabad Municipality, L. R. 27 Bom. 221.

(u) *Tribhovan v. Ahmadabad Municipality*, L. L. R. 27 Bom. p. 221.

(v) *London's (Chamberlain) Case*, 5 Co. Rep. 62b.; *Calder and Hebble Navigation Co. v. Pilling*, 14 M. & W. 76; *Toronto (City) Municipal Corn. v. Virgo*, (1896) A. C. 88 (P. C.)

(w) *Gentel v. Rapps*, (1902) 1 K. B. 160.

The courts require strict adherence with the procedure, any substantial deviation from it being considered fatal to the validity of the bye-law in question (x). There is one important point in connection with the procedure which is worth our consideration at this stage viz., necessity of confirmation of bye-laws passed by municipalities by the Local Government before they become operative. It should be borne in mind that the confirmation by the Local Government of a bye-law which is *ultra vires* of illegal does not make it *intra vires* or legal or operative. This has been the decision of English as also of Indian courts (y).

Beside fulfilling the statutory requirements laid down by the legislature, the bye-laws of municipalities must fulfil the requirements which are insisted on by common law. The bye-laws of municipal corporations as also of other corporations must be just and reasonable (z). A bye-law which is manifestly partial, and unequal in its operation between different classes or unjust or made in bad faith or clearly involving unreasonable interference with the liberty of those subject to it will not be supported by courts of law (a).

There is a class of bye-laws which are rather closely scrutinised by the courts of law, viz., those that seek to interfere with the rights and liberties of those who are subject to them (b). A very strong and decided opinion was expressed on this point in an Allahabad case (c) the main facts of which were as follows: The plaintiff was the owner of a long established market. The municipality of Cawnpore established a market of their own and wanted to close the plaintiff's market. Sec. 55 of Oudh and N. W. P. Municipality Act authorised municipalities to make rules prohibiting or controlling the establishment or maintenance of markets and controlling their management. The old rule which the Cawnpore municipality had framed under this section did not permit them lawfully to close the plaintiff's market; so they got a new rule passed, with the sanction of the Local Government, to the following effect: "No person shall establish or maintain a public market, etc.....in any place without the sanction of the Board or except under such conditions as the Board may from time to time prescribed." Armed with this rule the municipality proceeded to close the plaintiff's market. The latter brought a suit for injunction. Edge, C. J., and Blair, J., who heard the appeal, after characterising the conduct of the municipality as not altogether free from considerations of a *malafide* character observed as follows: "In our opinion,.... it never could have been the intention of the legislature to give power to a Municipal Board to make a rule which would

(x) *Q. E. v. Yusuf Khan*, I. L. R. 8 All. 677.

(y) *Foster v. Dodd*, L. R. 1 Q. B., 475. *Kruse v. Johnson*, (1898) 2 Q. B., 91; *Ellwood v. Bullock*, 6 Q. B., 383. *Brindaban v. Chairman, Serampore Municipality* 19 W. R. 309. *R. v. Yenku Bapuji and others*, 8 Bom. H. C. Reports (Cr. cases) 39 at 48, per Westroop, C. J.

(z) *Slattery v. Naylor*, 13 Ap. Cas. 446; *Kruse v. Johnson*, (1898) 2 Q. B., 91; *White v. Morley*, (1899) 2 Q. B. 34; *Clayton v. Pierse*, (1904) 1 K. B. 424; *Scott v. Pilliner*, (1904) 2 K. B. 855.

(a) *Emperor v. Balkishan*, I. L. R. 24 All. 439.

(b) *Corporation of Calcutta v. Judih*, I. L. R. 20 Cal. 605.

(c) *Ganga Narayan v. Municipal Board of Cawnpore*, I. L. R. 19 All. 313.

enable them to confiscate private rights in markets, where the holding of the market and the maintenance of the market could not be objected to on public grounds without making any compensation to the persons whose rights are affected. But until the legislature tell us that it was the intention to confer upon Municipal Boards the power to confiscate private rights... and to do so without paying any compensation, we must construe clause (e) in such a manner as not to cast slur upon the legislature of having worked a gross injustice, and we do so construe."

We shall notice another case decided by the Bombay High Court (d). There the municipal commissioners acting under sections 6 and 7 of Bombay Act XXVI of 1850 had conferred on their managing committee the power to try persons charged with having broken their rules or bye-laws and to levy fines upon them. It was held that municipal commissioners appointed under Bombay Act XXVI of 1850 had not by that Act conferred upon them, nor were they entitled to assume, judicial powers with reference to breaches of rules or bye-laws made by them under the Act and that accordingly rules made under the above Act which purported to give the managing committee the power to try offenders against such rules and to levy fines upon them were *ultra vires* and illegal.

When a taxing authority is called upon to assess the tax based upon annual letting value he does very wrong if he rates as if he were dealing with the question for the income tax (e). So where a Cantonment Magistrate under section 22 of the Cantonments Act (III of 1880) assumes power that the law has not given him and calculates the tax not on the annual value, but on some strange and novel method of his own, the enhancement is *ultra vires* (f).

In many Provinces, the law relating to Municipalities has been re enacted. In Madras, see City Municipal Act (IV of 1919), Dist. Municipalities Act (V of 1920), in United Provinces, see Act II of 1916, in the Punjab, Act III of 1911.

In *Srinivasa v. Rathnasabapathi* (g) the council of a municipality, under Madras Act IV of 1884, entered into a contract for the lighting of the town whereby it was provided that the deposit made by the contractor should be forfeited on any default made by him in carrying out the terms of the contract. One holding a decree against the contractor attached the amount of the deposit in the hands of the municipal council, but the council subsequently passed a resolution in July 1888 declaring that the amount of the deposit had been forfeited. The decree-holder having purchased from the contractor his right to the money in question now sued in 1890 to recover

(d) *R. v. Yenku Bapuji and others*, 8 Bom. H. C. Reports (Cr. cases) 39. See also *R. v. Kalidas Keval*, 5 Bom. H. C. Reports (Cr. cases) 10.

(e) *Mersey Dock and Harbour Board v. Birkenhead Assessment Committee* (1901) A. C. 175.

(f) *Secretary of State v. Major Hughes*, 38 Bom. 293. See also *Kasanddas v. Ankleshvar Municipality*, 26 Bom. 294.

(g) 16. Mad. 474.

it from the municipality: It was held that the provision for forfeiture in the contract was penal and unenforceable and consequently that the resolution of July 1888 was *ultra vires*.

In *Govardhandas Goculdas Tejpal v. The Municipal Commissioner* (h) under section 158 of the City of Bombay Municipal Act, (Bombay Act III of 1888) the following general conditions were prescribed by the Standing Committee with reference to claims for drawback of the general property tax leviable in Bombay:

(1) "Except with the special sanction of the Commissioner, no claim for draw-back shall be entertained unless submitted to the Commissioner not less than 30 days before the commencement of the half year to which such claim relates.

(2) Drawback of the one fifth part of the general tax shall be sanctioned by the Commissioner in cases falling within either of the following classes and in no others—

(a) Chawls or buildings let out for hire in single rooms either as loading or godowns for the storage of goods.

(b) Properties which, in the opinion of the Commissioner, are usually or frequently vacant either wholly or partially.

(3) No sanction for drawback shall extend or apply to any floor on which trade or manufacture is carried on, or any goods are sold."

The Commissioner having refused to sanction a drawback of the tax leviable on certain properties of the plaintiff on the ground that they did not fall within the terms of the above conditions, the plaintiff filed the suit. It was contended in his behalf that the second and third of the above conditions were bad, and that the Standing Committee could not by so-called general conditions limit or curtail the right given to tax-payers by section 158. It was held that the conditions prescribed by the Standing Committee were not *ultra vires* and that the Commissioner was justified in refusing the drawback.

In *Emperor v. Nadirsha H. E. Sukhia* (i), the accused was convicted and fined Rs. 25 for not complying with a notice issued by the Municipal Commissioner of Bombay under section 231 of Bombay Act III of 1888. The notice required him to make an open drain in the gully on the west of his premises, this drain to be so constructed as to adjoin the west wall of his building. It was held (reversing the conviction and sentence) that the notice was *ultra vires* inasmuch as it required the accused to construct a drain, adjoining a particular part of his premises.

In *Emperor v. Nagindas Chhabildas* (j), where accused rented a shop in a public street and projected therefrom a shopboard into the street without having obtained permission of the Municipality and without paying the fees prescribed in that behalf by the Municipality in its bye-law 10, on prosecu-

(h) 17. Bom. 394.

(i) 29 Bom. 35.

(j) 42 Bom. 454.

tion for offences under section 113 and 122 of the Bombay District Municipalities Act, 1901, the contention that bye-law 10 was *ultra vires* was not accepted.

(k) In *Godhra Municipality v. Hira Lal* (k), a person was charged with building a house without permission, while a permission granted 3 years before was limited only for six months. Heaton J., said that the Municipality had power to say that a work to which it gave permission under section 96 of the Bombay District Municipalities Act (III of 1901) should be begun within a certain time, but doubted if "the Municipality has power to say that a work must be finished within a given time." Hayward, J., said that a time-limit was not contemplated by the Legislature in enacting that section and that such a limit contained in a permission to build was *ultra vires* (l).

The provisions of S. 15 of the Calcutta Municipal Act do not apply to the appointment of Municipal officers and servants whose appointment are expressly provided for by Chapter VI of the Act. Under S. 65 of the Act, the Chariman may appoint officers and servants on a salary below Rs. 200 a month, but such appointment is subject to an annual sanction by the General Committee; any appointment made outside the terms authorised by the section is *ultra vires* (m).

Rule 1 of the Rules framed by the Gaya Municipality under the powers vested in them by section 241(d) of the Bengal Municipal Act (III) of 1884 is not *ultra vires* or unreasonable. Section 241(d) indicates the time or foundation upon which a Municipality should frame their rules. If they exceed their jurisdiction and the limitation imposed upon them by the section, then these rules will be *ultra vires*. An order therefore made by the Municipality to a house-owner to leave an open space between the external wall of his house and the drain adjoining the road is not illegal (n).

Under Section 116(1) (j) of the Berar Municipal Law, 1886, a committee is empowered to make rules for certain purposes and generally for carrying out the purposes of the municipal law, but it does not, even by implication, authorise a committee, to make a bye-law depriving the public of a right long enjoyed by it. A bye-law made by the Camp Municipal Committee of Amroati under Sections 79 and 116 of the said Act, prohibiting within the limits of that Committee, a particular class of traffic on certain specified roads, the effect of the bye-law being to deprive the public of a right, in respect of the prohibited traffic which it had long enjoyed, the bye-law was illegal and *ultra vires*, a conviction for a breach of its terms could not be maintained. The mere fact of the Local Government having signified its approval to a bye-law would not render the bye-law valid, in the absence of clear and unmistakeable language in the Act empowering a committee to make such a bye-law (o).

(k) 51 I.C. 262.

(l) *Q. E. v. Thakordas Rat. Unrep. Cr. Cas.* 684.

(m) *Dedar Nath Bhandary. v. The Corporation Calcutta.* 34 Cal. 863.

(n) *Chairman, Gaya Municipality v. Sukan singh*, 37 I. C. 854.

(o) *Mahamed Sarwar v. Secretary, Camp Municipality, Amroati* 57 I. C. 341.

By one of the bye-laws of the Delhi Municipality framed under section 188 of the Punjab Municipal Act, "occupiers" of stables used for more than six animals were required to obtain a license from the committee, and the word "occupier" was defined as meaning "the person who is responsible for the letting or sub-letting of the premises to the person in charge of animals, and many include the owner." The Municipal Act itself in paragraph (10) of section 3, however, defined "occupier" as including an owner in actual occupation of his land or building, etc. The petitioner was owner of stables which had been leased to one R M and in which more than six animals were stabled without a license. The petitioner was fined Rs. 10 for a breach of the bye-laws. It was held, that the definition of "occupier" as given in the bye-laws cannot be enforced so far as it is inconsistent with that given in the Act itself. The bye-law making the owner responsible in a case where he is not in actual occupation and has no power to control the acts of his tenant with regard to the use of the premises leased is manifestly unjust to the owner and hence unreasonable, and the English law as to the necessity of bye-laws being reasonable is applicable to bye-laws framed in the exercise of their statutory powers by Municipal Boards in India (p).

The jurisdiction of the civil courts is not ousted when the question is, whether a particular tax purporting to have been imposed under the Berar Municipal Law has any legal existence. When the levy and assessment of any tax by the committee, purporting to be done under the authority of the Berar Municipal Law, is alleged to be *ultra vires* the civil courts have jurisdiction to entertain the suit. Where the committee acted *ultra vires* and charged income not liable to tax, the civil court has jurisdiction to entertain the suit and to direct the refund of the amount realised in excess. It is not competent to a Municipality in Berar to assess to tax professional income derived by the assessee outside the municipal limits, when such income is not brought into or mixed up with the income arising within the municipality (q).

An assessment of tax made under section 85 of Bengal Municipal Act (III of 1884) is final only when that assessment is based upon the circumstances and the property of the assessee within the municipality. Where the assessment is not in conformity with the statutory provisions and is *ultra vires*, section 110 of that Act does not operate as a bar to the re-opening of the question of the amount of assessment in a civil court, merely because the assessee applied under section 113 to the commissioners to review the amount of assessment, and the application was heard by them under section 114, and was disallowed. In an action for the recovery of tax, the assessee can urge that the assessment of tax was *ultra vires* (r).

(p) *Joti Pershad v. Crown*, 2 Lah. 239=64 I. C. 129, following *Narayan Chandra v. Corporation of Calcutta*. 4 I. C. 259.

(q) *Municipal Committee Malkapore v. Amrit Waman Dayal* 65 I. C. 532.

(r) *Chairman, Rajpur Municipality v. Nogendranath*, 50 I. C. 594. See also *Debnarain v. Chairman, Baruipur Municipality*, 39 Cal. 141; *Manessur Dass v. Collector and Municipal Comr. of Chapra*, 1 Cal. 409; *Chairman of Giridih Municipality v. Srish Chandra Mazumdar*, 35 Cal. 859; *Kameshwar v. Chairman, Bhabua Municipality*, 27 Cal. 849.

The accused was convicted and sentenced for the offence of storing and selling grain wholesale within the Cannanore Municipal limits without the license of the Municipal Chairman under Sections 249 and 338 (b) of the Madras District Municipalities Act (V of 1920) contrary to a notification issued in July 1920 by the Municipal Council constituted under the repealed Act of 1884 purporting to act under S. 249 of the new District Municipalities Act (V of 1920), some two months before the new Act was put in force. On revision it was held that the notification was not a valid one under the new Act because the Council purported to act before the new Act came into force and the notification was therefore invalid and consequently the accused was not guilty of the offences under the new Act. The fact that the petitioner was in no way prejudiced is immaterial when the question arose in connection with the application of a penal provision as a strict construction of the law is required in such a case. The notification cannot be supported as a "rule", "bye-law" or "regulation" under the proviso to S. 365 of the new Act, as the conditions requisite for that purpose are not satisfied (s).

The Bengal Municipal Act of 1884 was in force for nearly 50 years. The Act naturally failed to provide for several new developments in municipal administration which merited the attention of even petty municipalities and a necessity was accordingly felt for a modern Municipal Act operating in all areas which enjoyed a municipal constitution.

The somewhat inconvenient arrangement of the Act of 1884, whereby the provisions regarding the constitution, procedure and various simple measures of sanitation and improvement applied to all municipalities, while other parts containing important administrative provisions applied when expressly extended, had its basis in the existence which in 1876 were first brought within the scope of a single Act.

Accordingly Local Government in 1905 addressed the Government of India on the subject of the amendment of the Bengal Municipal Act (III of 1884). Their proposals for the most part aimed at removing legal difficulties and ambiguities and perfecting the working of existing provisions by the addition of new clauses which experience had shown to be necessary. Other proposals were designed to improve the constitution of appellate committees, to delegate to Divisional Commissioners certain powers for the time being vested in the Local Government, to empower riverside municipalities to regulate the traffic of boats within municipal limits, to authorise the levy of a tax on dogs and rickshaws, to legalize and increase in the rate on holdings for the purpose of guaranteeing interest on capital expended on the construction of light railways or tramways, to justify the expenditure of municipal funds on the construction and maintenance of hostels and finally to introduce a trades and professions tax.

These proposals received the general approval of the Government of India, which, however, suggested that it was preferable to re-enact the Bengal Municipal Act, 1884, as a whole on more modern lines. The Legislative

(s) *In re Sesha Prabhu*, 42, M. L. J. 149=66 I. C. 429.

Department of the then old province of Bengal welcomed this suggestion and took the opportunity of pointing out that the Act was loosely drawn, that it had been extensively amended by Act III of 1894 and Act II of 1896, slightly amended by Act III of 1886 and Act V of 1897, and partially repealed in six other Acts. A consolidating Bill instead of an amending Bill was therefore decided upon.

The Bill that was eventually put forward was based on the Bill placed before the Council in 1925 as further revised with the assistance of a departmental Advisory Committee. The division of the Bill into different chapters dealing with distinct subjects was certainly an improvement in the arrangement of the Act of 1884 and the chapters dealt with no phase of municipal activity which was not already a commonplace of municipal administration in England.

Where any chapter was for the time being beyond the scope of a particular town, it still, though it might remain for some years a dead letter, possessed educative value and marked a goal at which the body corporate, at a later stage, might easily aspire.

Under the Bengal Municipal Bill, 1932, which is the foundation of the present Act of 1932, the main body of the municipal law is to apply automatically to all municipalities and it was merely the elaborate provisions regarding streets, buildings and bustees, which required to be expressly extended by the insertion of a special chapter containing those provisions which the special conditions of hill municipalities rendered necessary, it was possible to repeal the Darjeeling Act (I of 1900) and to avoid the inconvenient inter-leaving of provisions peculiar to Darjeeling with other provisions of the Act.

This Act has consolidated and amended the law relating to municipalities in Bengal. It was enacted after obtaining the previous sanction of the Governor-General under sub-section (3) of Section 80A of the Government of India Act. It was repealed in part and amended by Bengal Act IX of 1933 and Bengal Act I of 1939. It was repealed in part by Bengal Act XVI of 1946, West Bengal Act XVIII of 1950 and West Bengal Act XX of 1958. It was amended by Bengal Act XI of 1936, West Bengal Act XI of 1947, West Bengal Act XXV of 1950, West Bengal Act XXVIII of 1951, West Bengal Act X of 1952, West Bengal Act XXV of 1953, West Bengal Act XXI of 1954, West Bengal Act XXVII of 1955, West Bengal Act III of 1960, West Bengal Act I of 1961, West Bengal Act XVIII of 1961, West Bengal Act XXII of 1962, West Bengal Act VI of 1963, West Bengal Act XXIII of 1965, West Bengal Act XVI of 1966, West Bengal Act VII of 1969 and West Bengal Act XXII of 1969 and once again in 1972. This Act was extended to Chandernagore by West Bengal Act XVIII of 1955.

This Act having been enacted in 1932 was an existing law immediately before the commencement of the Constitution on the 26th of January, 1950. The subject-matter of this Act is contained in Entry 5 of List II, Seventh Schedule to the Constitution. "Local Government" being an exclusively State subject, all amendments to the Act after the commencement of the

Constitution were made by the Legislature of West Bengal which was therefore competent to do it.

To refer to a few instances, it may be pointed out that Section 162 as substituted by the Bengal Municipal Amendment Act, 1955 came into force on October 1, 1955. It consisted of two sub-sections. Sub-section (2) was to the following effect: "Instead of proceeding by distress and sale or by certificate as prescribed in sub-section (1) or in the event of failure in either case to recover the whole or any part of the sum due, the Commissioners may sue the person liable to pay the same in any Court of competent jurisdiction." Sub-section (2) evidently provided for three modes of recover-(1) by distress and sale; (2) by certificate and (3) by a suit. Unguided and uncontrolled authority was conferred upon the commissioners to choose which particular procedure was to be followed in realising the dues. There was therefore the possibility of discrimination as between defaulters. Hence sub-section (2) was *ultra vires* and void as being repugnant to Article 14 of the Constitution. It is for this reason that the High Court at Calcutta held that the recovery of dues by distress was unconstitutional and void. Sub-section (2) of section 162 was however omitted by the Bengal Municipal (Second Amendment) Act, 1961 and after Section 162, a new Section, namely, 162A was inserted. 162A consists of two sub-sections and sub-section (1) is to the following effect: "In the event of failure to recover the whole or any part of the sum due by certificate as prescribed in Section 162 the Commissioner may sue the person liable to pay." The Bengal Municipal (Second Amendment) Act, 1961 cured the defect affecting the validity of a sale by issue of distress warrant. Hence the High Court pointed out that there was no further scope to challenge the unconstitutionality of the relevant provisions of the Bengal Municipal Act after the 1961 amendment with regard to the different methods for recovery of Municipal dues^(t).

In an assessment matter the High Court held the impugned valuation as *ultra vires* for following reasons: Assuming that the Respondents' contention that there being no comparable holding in the Municipality, the Respondents need not travel outside their jurisdiction in search of a comparable premises is correct, even then the impugned valuation would be *ultra vires*, because the Respondents having rejected the other standards offered by the rent alleged to have been actually paid by the petitioners, the disputed holding may constitute a case where the 'gross annual rental' referred to in sub-section (1) cannot be easily estimated or ascertained, and the provisions of sub-section (2) of Section 128 and Clause (b) of rule 8 of the Rules would at once be attracted. But the valuation was made neither on the basis of the rental of comparable premises nor on the basis of the value of the building in question as required by sub-section (2) of section 128, and the impugned valuation would be *ultra vires* in any view of the matter.

What the Respondents have purported to do is to determine the 'gross annual rental' on the basis of the 'profits test'^(u).

(t) *Basirhat Municipality v. Anukul Chandra Das*, 77, C. W. N. 791.

(u) *Kalipada Dawn v. Commissioners, Vishnupur Municipality*, 68 C. W. N. 949.

Sections 133 and 134 and the rules framed thereunder relate to inquiries and inspection by assessor for assessing the valuation of a holding. Where the assessor in determining the annual value did not comply with the provisions of Rules 8(1), 9 and 10 the noncompliance renders the valuation made by assessor *ultra vires* (v). When assessor delegates his duties to his agents or appraisers it is not his assessment but that of his agents. In *R. v. Board of Assessment* (w), an assessment made by a Canadian Tax Assessment Board was set aside when it was found that what the Board did was merely to adopt the valuation made by appraisers. Principles in this respect which were laid down by the Supreme Court in the cases of *Commissioner of Police v. Gordhandas* (x) and *B. Rajagopala Naidu v. S. T. A. Tribunal, Madras*, (y) support the same conclusion. See also *N. M. C. S. & W. Mills v. Ahmedabad Municipality* (z), *Khurai Municipality v. Kamal Kumar* (a). Applying these principles the assessment in another case was set aside and writ of *certiorari* was issued by the Calcutta High Court for non-compliance with the above quoted rules (b).

Again before imposing tax on land and building in a municipal area, the area of the Municipality must be clearly defined. In a case before the Rajasthan High Court the facts were that owing to increase in the population of the Gram Panchayet at Ahore which was an important business market and all the facilities for the development of the town were available, the State Government, by a notification, converted the Gram Panchayet into Municipality under the Rajasthan Municipalities Act, 1959 and consequently the Land and Building Tax Act, 1964 was introduced in the area covered by the newly constituted Municipal Board of Ahore. On the materials before it, the High Court found that the limits of the Municipality of Ahore have not been precisely specified in the aforesaid notifications and thus the mandatory provisions of Sections 4 and 6 of the Act of 1959 have not been complied with and therefore there was no validly constituted Municipal Board and as such it had no right to recover the land and building tax as a municipality from the inhabitants of that area (c). In coming to this conclusion the Division Bench relied upon three earlier decisions of that Court *Somath v. State of Rajasthan* (d), and *Jainarain v. State of Rajasthan* (e), and *Sahlot Brothers v. State of Rajasthan* (f). In *Somath's* case it was held that it was elementary that before imposition of taxes could receive legal recognition or operation the limits of the Municipality concerned

(v) *Tollygunj Club Ltd. v. Corporation of Calcutta*, 1963 C. L. J. 10.

(w) (1965) 49 D. L. R. (2nd) 156

(x) A. I. R. 1952 S. C. 16.

(y) A. I. R. 1964 S. C. 1573.

(z) A. I. R. 1967 S. C. 1801.

(a) A. I. R. 1965 S. C. 1321.

(b) *P. K. Mondal v. Commissioner, Krishnagar Municipality*, 82 C. W. N. 457.

(c) *Kan Raj v. State*, A. I. R. 1979 Raj. 164.

(d) A. I. R. 1954 Raj. 162.

(e) 1955 Raj. L. W. 454.

(f) 1956 Raj. L. W. 402.

must have been defined by or under competent authority. *Jainarain's* case followed the above principle and held that the taxing power of the Municipal Board must be limited to its own territorial limits and such limits must be defined by the State by which the Municipality derives all authority to perform its functions. In *Sahlot Brother's* case the Court had observed that where territorial limits of the municipality are not defined according to law and in precise terms, it would be impossible to hold that a municipality or a Municipal Board governing it at any particular time, has been brought into existence, or that it can function effectually and compel submission without which all government is rendered futile. Joshi, Actg Chief Justice sitting with Miss Bhatnagar J. in *Kan Raj's* case (supra) followed the three decisions quoted above and very rightly observed that the boundaries should be defined in a manner which could be immediately ascertained on the spot and not by a circuitous way of finding out from the revenue records.

Imposition of tax on land and buildings or of fees on vehicles within a well defined municipal area is as much a serious matter as the defining of the territorial limits of the municipality itself. In *Municipal Council, Bhopal v. S. S. Multipurpose Transport (g)*, the Supreme Court had held that the Madhya Pradesh Municipalities Act, 1961 did not empower the municipality to pass a bye-law declaring certain place as a Municipal Bus Stand and could not compel the persons plying motor buses for hire to park buses anywhere within the municipal limits except at the Municipal Bus Stand for the purpose of taking up or setting down of passengers. This could only be done under a provision like the one contained in Sec. 68(2) (r) of the Motor Vehicles Act under which the power to specify the place was vested in the State Government. Relying fully upon the above decision Dubey and Navkar JJ sitting on the Gwalior Bench of the Madhya Pradesh High Court in *Sindh Transport Co v. N. P. Parishad (h)* held that if the Municipal Council had no power to create a Bus Stand, it would not have also the ancillary power to impose a tax or fee in respect of the same. It could not do indirectly what it could not do directly. Even if the Bus Stand was under its control for management purposes it had no power to enhance the fee and it could not charge a fee unless such power was clearly found in the Act. The power, in this case, having been exercised in excess of the Act the notification was struck down as *ultra vires*.

Sections 297 to 301 of the Bombay Municipal Corporation Act, 1888 have been held by Bharucha J as *ultra vires* Art 14 of the Constitution in so far as they relate to the compulsory acquisition of land and the compensation to be paid therefor as there is no difference between the owners whose lands are to be acquired under the provisions of Sec 297 to 301 for the prescription of regular line of the street and the owners whose lands are to be acquired under Sec. 296 for ordering or extending a public street. There is no classification founded on an intelligible differentia between the two (i).

(g) A. I. R. 1973 S. C. 2420.

(h) A. I. R. 1979 M. P. 142.

(i) *D. S. Rage v. Bombay Municipality*, A. I. R. 1979, Bom. 311.

C. Rajagopalachari, who held office as the last Governor-General of India, had to come up before the Supreme Court in 1962 against a judgment of the Madras High Court dismissing his petition under Art. 226 of the Constitution seeking a writ of prohibition against the Corporation of Madras challenging the constitutional validity of a notice requiring him to pay profession tax. The Corporation had imposed a profession tax on Rajagopalachari because he was in receipt of a pension of Rs. 15,000/- per annum and had his residence in the City of Madras. The Corporation demanded this tax under Section 111(1) of the Madras City Municipal Act, 1919 as amended in 1936. The Supreme Court held that imposition of tax on a person who was in receipt of pension was *ultra vires* the State Legislature. Such imposition could not also be justified under Art. 277 of the Constitution as a tax which were being levied prior to the commencement of the Constitution. The Supreme Court observed that being a pensioner cannot be a profession, trade, business or calling nor could a tax on a person because he is in receipt of a pension be said to be a tax on employment (j).

A licence fee on a cinema house is not a fee for services rendered but is a tax. Calculated on the basis of annual valuation of the Cinema house known as Liberty Cinema at Calcutta a fee of Rs. 400/- per year was imposed in 1948. Ten years later, by a Resolution the Corporation of Calcutta raised the licence fee to Rs. 6,000/- per year changing the basis of assessment i.e. assessing at rates prescribed per show according to the sanctioned seating capacity of the cinema house. The Supreme Court held that such imposition was not unconstitutional. The Court referred to Sections 443 and 548 of the Calcutta Municipal Act, 1951 and found that there was nothing of excessive delegation of the power of the legislature or as providing no guidance to the delegate for the exercise of the power (k). Imposition of a licence fee of Rs. 30/- on each rickshaw owner and Rs. 5/- on each rickshaw driver were however declared *ultra vires* and the Court asked the Municipal authority to reduce the fee to a reasonable figure correlating it to the services rendered (l). But when the Corporation by a provision in the Statute makes its opinion or decision conclusive and non-justiciable such provision must be struck down as unconstitutional (m). Similarly, Rules and Bye-laws have statutory force and courts have the duty to scrutinise the validity thereof, when challenged, and if any rule or law does not appear to have been validly framed the Courts have to declare the same as *ultra vires* (n). Restriction by a Municipality in its bye-law continuing sale of fruits and vegetable to fixed or limited shops in a bazar is an unreasonable restriction and therefore such bye-law is *ultra vires* (o).

(j) *C. Rajagopalachari v Corporation of Madras*, 1965 (1) SCA 1.

(k) *Corporation of Calcutta v Liberty Cinema*, 1965 (1) SCA 657.

(l) *Nagar Mahapalika v Durgadas*, 1968 ALJ 936 S.C.

(m) *Corporation of Calcutta v Calcutta Tramways*, 1965 (1) SCA 124.

(n) *Veerappa v State of Mysore*, AIR 1965 Mys 227 FB.

(o) *Rashid Ahmed v Municipal Boards*, AIR 1950 S.C. 163.

FROM LOCAL BOARDS TO PANCHAYETS

The growth of local institutions outside the cities was rather slow. In Madras and Bombay there were semi-voluntary funds for local improvements which formed the foundation for local self-government. In Bengal and the United Provinces

Early history. consultative committees assisted the district officers in the management of funds devoted to local schools, roads and dispensaries. The system of raising local cesses current under the Native Governments was first sought to be replaced in Sindh by Bombay Act VIII of 1865. That Act gave power to levy cess on land, or shop or office in the same way as land-revenue. It presupposed the existence of local executive committees, but made no provision for their constitution. In 1866 an Act was passed for the levy of a local rate in the Madras Presidency, but the rate-payers took no part in the administration of the funds. In 1869 an Act was passed for the levy of cess on land, fixing the maximum, and for the recovery of the cess by landholders from their tenants. The proceeds of the cess were to be administered by committees nominated by the Government and under the supervision of the Collector.

In 1870 Lord Mayo adopted the policy of financial decentralisation and the resolution of the Government was in these terms: "Local interest, supervision and care are necessary to the success in the management of funds devoted to education, sanitation, medical charity and local public works. The operation of this resolution in its full meaning will afford opportunities for the development of self-government, for strengthening municipal institutions, and for the association of Natives and Europeans to a greater extent than hereto in the administration of affairs." As a consequence of this policy, there was a wide development of legislation for local purposes and in 1871, new Acts were passed in Madras, Bengal, the United Provinces and the Punjab. These Acts provided for the levy and collection of rates, divided the country into local fund circles, and constituted consultative boards, nominated or elected, mostly under the presidency of the Collector. For the following ten years, this system of management by the boards was nominally working, though in reality, the members of the boards took little interest and left the management of the funds entirely in the hands of the officers of the district.

Policy of Lord Mayo. In 1881-82, the Government of Lord Ripon issued orders for the re-organisation of local institutions and for the extension of the principle of local self-government. Under these orders the existing local committees were to be replaced by a new type of boards all over the country and the lowest

Extension of the principle by Lord Ripon.

administrative unit was to be small enough to secure real interest on the part of the members and the various minor boards were to be subordinate to a district board, on which the minor boards were represented. The Government also transferred to these boards certain items of provincial revenue, and assigned to them a proportionate share of the provincial expenditure. Acts were accordingly passed in the several provinces, with variations suitable to the conditions of the locality(a).

Under these Acts each province devised a system of boards of different gradations. In Bengal, a district board was constituted for each district and the establishment of subordinate local boards was left to the discretion of the Local Government. In Bombay and the United Provinces, two grades of local boards were created, the district boards, and the taluk board and in Madras there was a third grade, namely, unions of villages. We shall now proceed to examine the constitution, functions and powers of the local boards, with special reference to the Bengal Local Self-Government Act of 1885.

Local boards were mostly under the control of the Local Government. They were created but their jurisdiction was limited by the notifications of the Local Governments. The members were partly elected and partly or wholly appointed by the Local Government (b). The Lieutenant-Governor could make rules for the qualification of persons entitled to vote for election of members of local boards as well as of persons entitled to be members of local boards (c), could remove any member under specified circumstances (d), could see that the proceedings of the local authorities were in conformity with the law and could annul any proceedings not so in conformity (e), inspect all books, proceedings and records (f), appoint an officer to be inspector of local works (g), make rules for certain purposes (h), and could on persistent default in the performance of duties imposed on it by law supersede a local board for a period to be specified in a notification (i). Lastly, for several acts and transactions the local boards required the sanction and confirmation of the Local Government for their validity (j).

In Bengal, district boards were established in each district, but the Lieutenant-Governor could by notification establish a local board in any sub-division or in any two or

Local Self-Government Acts.

Control of Local Governments.

Constitution.

- (a) Bengal Act III of 1885; Madras Act V of 1884; Bombay Act I of 1884; Act I of 1883 (Central Provinces); Act XX of 1883 (Punjab); Act III of 1906 (United Provinces).
- (b) Sec. 7 of Act III of 1885 (B. C.)
- (c) Sec. 9, 13 *ibid.*
- (d) Sec. 18 *ibid.*
- (e) Sec. 12 *ibid.*
- (f) Sec. 121 *ibid.*
- (g) Sec. 13 *ibid.*
- (h) Sec. 138 *ibid.*
- (i) Sec. 131 *ibid.*
- (j) Sec. 32, 129 *ibid.*

more sub-divisions combined (*k*). A district board consisted of such number of members, not being less than nine, as fixed by the Lieutenant-Governor and included elected and appointed members, provided that if there be no local board within a district, the whole of the district board would consist of appointed members (*l*). A local board consisted of such number of members, not being less than six, at the discretion of the Lieutenant-Governor (*m*). The term of office of members, other than those appointed by official designation, was fixed by rules made by the Lieutenant-Governor (*n*). Every district board was presided over by a chairman appointed by the Lieutenant-Governor or should the Lieutenant-Governor in any case so direct, by a person elected by the members of such board from among their numbers, subject to his approval (*o*), and every district board would from time to time elect one of its members to be vicechairman (*p*). Every local board elected its own chairman subject to

the approval of the Lieutenant-Governor (*q*). The
Removal of members. Lieutenant-Governor could remove any member of
a district board or local board:

- (a) if he refuses to act, or becomes incapable of acting, or is declared insolvent, or is convicted of any such offence or subjected by a criminal court to any such order, as in the opinion of the Lieutenant-Governor, formed after due enquiry, unfits him to be a member;
- (b) if he has been declared by notification to be disqualified for employment in the public service;
- (c) if he, without an excuse, sufficient in the opinion of the Lieutenant-Governor absents himself from six consecutive meetings of the board;
- (d) when he is a salaried servant of the Government, if his continuance in office is, in the opinion of the Lieutenant-Governor, undesirable (*r*).

The Lieutenant-Governor could remove any chairman of a district board or local board from his office if he refused to act, or became incapable of

acting, or declared insolvent, or convicted of any
Removal of Chairman such offence, or subjected by a criminal court
and Vice-chairman. to any such order, as, in the opinion of the Lieutenant-

Governor, formed after due enquiry, unfits him to be chairman, or on the application of the board, if he persistently neglected his duty as chairman.

A district board or local board could remove its vice-chairman from his office if he refused to act, or became incapable of acting, or declared insolvent,

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- (*k*) Sec. 6 *ibid*.
 - (*l*) Sec. 7 *ibid*.
 - (*m*) Sec. 8 *ibid*.
 - (*n*) Sec. 16 *ibid*.
 - (*o*) Sec. 22 *ibid*.
 - (*p*) Sec. 23 *ibid*.
 - (*q*) Sec. 26 *ibid*.
 - (*r*) Sec. 18 *ibid*.

or convicted of any such offence, or subjected by a criminal court to any such order, as, in the opinion of the board, formed after due enquiry, unfits him to be vice-chairman, or if he persistently neglects his duty as vice-chairman (s).

If a district board or local board is not competent to perform or persistently makes default in the performance of the duties imposed on it by or under this or any other Act, or *exceeds or abuses its powers*, the Lieutenant-Governor could, by notification, specifying the reason for so doing, supersede such district board or local board for a period to be specified in such notification (t). When a district board or local board is superseded the following consequences shall ensue—

Supersession of boards.

- (a) all members constituting the district board or local board shall from the date of the notification vacate their offices as such members;
- (b) all powers and duties of the district board or local board may until such district board or local board is reconstituted, be exercised and performed by such person or persons as the Lieutenant-Governor may from time to time appoint in that behalf;
- (c) when a district board is superseded, all property vested in it shall, pending the reconstitution of the board, be vested in the Lieutenant-Governor (u).

On the expiration of the period of supersession specified in the notification, the board shall be re-established, and the persons who vacated their offices under clause (a) shall be eligible for appointment or election. Nevertheless it shall be lawful for the Lieutenant-Governor to direct that a local board thus re-established shall consist entirely of appointed members, although such local board may have been established in a district mentioned in the third schedule of the Act (v).

Re-establishment of boards.

Every district board shall be a body corporate by the name of "the district board of (name of district)" and shall have perpetual succession and a common seal, with power to acquire and hold property, both moveable and immoveable, and, subject to any rules made by the Lieutenant-Governor under the Act, to transfer any such property held by it, and to contract and do all other things necessary for the purposes of the Act, and may sue and be sued in its corporate name (w).

District board a body corporate.

From and after the establishment of a district board in any district all roads, bridges, channels, buildings and other property, moveable or immoveable, held by, or under the control and administration of, the district road committee or any branch committee in such district for the purpose

Vesting of property, Funds.

- (s) Sec. 28 *ibid.*
- (t) Sec. 131 *ibid.*
- (u) Sec. 132 *ibid.*
- (v) Sec. 132 *ibid.*
- (w) Sec. 20 *ibid.*

of the Cess Act, 1880, shall for the purposes of this Act, be under the control and administration of such district board;

Provided that all village-roads within the limits of any union established in the said district shall be under the control and administration of the union committee (x).

Every road, buildings or other work constructed by a district board from the district fund shall be vested in the district board by which it has been constructed (y).

There shall be formed for each district funds to be called the "district Funds. fund", and there shall be placed to the credit thereof—

- (1) the balance of the district road fund of the district, after payment of the expenses mentioned in section 109 of the Cess Act, 1880, as amended by this Act;
- (2) all sums levied within the district as fines, penalties or otherwise under this Act;
- (3) all sums accruing within the district under the provisions of the Cattle Trespass Act, 1871, from pounds which have not been transferred to any union committee under Part III of this Act;
- (4) all receipts in respect of public ferries within or on the boundary of the district which have been placed under the management of the district board under the provisions of the Bengal Ferries Act, 1885.
- (5) all receipts in respect of any schools, hospitals, dispensaries, railways, tramways or other buildings, institutions or works, which may have been constructed by, vested in or placed under the control and administration of a district board under Part III of this Act;
- (6) all sums which may be allotted to the district board from the provincial revenues by the Lieutenant-Governor for any of the purposes mentioned in Part III of this Act, or for any other purpose;
- (7) all sums contributed to the district board by local bodies or private persons.

The district fund shall be vested in the district board, and the balance standing to the credit of the fund shall be kept in such custody as the Lieutenant-Governor from time to time directs (z).

The district fund shall be applicable to the following objects, and in the following order :

Firstly :—To the payment of any sums which the district board may be liable to pay as interest upon loans raised by it under section 50 for the purposes of this Act, and to the formation of a sinking fund, when required.

Secondly :—To the payment of any sums which the district board may under this Act from time to time have undertaken to pay as interest on capital

(x) Sec. 73 *ibid.*

(y) Sec. 75 *ibid.*

(z) Sec. 52 *ibid.*

expended on any works which may directly improve the means of communication within the district, or between such district and other districts.

Thirdly :—To the payment of such percentage as the Lieutenant-Governor may, from time to time, direct, towards the cost of audit, and towards the cost of establishments in any office of account, or in any treasury.

Provided that the total amount, which any district board may be required to pay on this account, shall not in any year exceed two per centum on the whole amount of the district fund for such year.

Fourthly :—To the payment of the salaries of the establishments employed by the district board for the purposes of this Act, and of any pensions and gratuities granted under section 3 and section 35, and to the payment to the Government of such percentage as the Lieutenant-Governor may, from time to time, direct on the salaries of such establishments in consideration of the Government undertaking to pay the leave and pension allowances of such establishments.

Fifthly :—To the payment of expenses incurred by the district board in the performance of the duties imposed by this Act, and in the construction, repair and maintenance of any works which may become vested in, or be placed under the control and administration of, such Board under Part III of this Act.

Sixthly :—To the payment, at such rates as the Lieutenant-Governor may direct, of the travelling expenses incurred by members of the district board in attending meetings of the board or meetings of a joint-committee.

Seventhly :—To the payment of expenses incurred by the district board under section 80 of this Act.

Eighthly :—To investment in any local debenture loans issued by the Government of India, or by any municipal authority or local authority, for the construction of public works which may directly improve the means of communication within the district or between such district and other districts;

Provided—

- (1) that no sum shall be expended from the district fund in the construction of any channel for the purposes of irrigation; or for the purposes of drainage connected with any irrigation-works in charge of public officers, or for the improvement or maintenance of any water channel on which tolls are levied, when no portion of the proceeds of such tolls is paid of the district fund;
- (2) that no part of the district fund shall be applied to the construction, repair or maintenance of any road within any municipality which has been, or may hereafter be, constituted under the Bengal Municipal Act, 1884, unless such road shall have been expressly excluded from the operation of the said Act under section 30 thereof (a).

Every district board, and every local board with the sanction of the district board, may from time to time make rules as to—

- (a) the time and place of its meetings, the business to be transferred at meetings, and the manner in which notice of meetings shall be given;
- (b) the conduct of proceedings at meetings, the due record of all dissents and discussions, and the adjournment of meetings;
- (c) the custody of the common seal and the purposes for which it shall be used;
- (d) the division of duties amongst its members;
- (e) the powers to be exercised by the chairman or vice-chairman, or by sub-committees or members to whom particular duties are assigned;
- (f) the persons by whom receipts shall be granted for money received under this Act;
- (g) the duties, appointment, leave, suspension and removal of the officers and servants of the board; and
- (h) other similar matters; and may from time to time repeal or alter such rules.

Rules made under this section, consistent with this Act, were subject to the sanction of the Lieutenant-Governor, and, if sanctioned by him, be published in such manner as he may direct; and would have the force of law so long as they were consistent with the rules made by him under this Act (b).

Every district board or local board empowered in this behalf by the Lieutenant-Governor could make bye-laws for carrying out all or any of the purpose of this Act. Such bye-laws would have the force of law when confirmed by the Lieutenant-Governor and published in such manner and for such time as the Lieutenant-Governor would direct (c).

Among the important functions of district boards were the establishment, maintenance and management of pounds, primary and middle schools and, if authorised, of High English Schools, and of dispensaries and hospitals, the construction and maintenance of railways, tramways or other means of communication or of any means and appliances for improving the supply of drinking water. It was the duty of the district board to provide for sanitation, and to appoint, pay and manage the work of all public vaccinators. It would be lawful for a district board to provide measures for the relief of famine, establish and maintain staying bungalow and *sarais*, offer rewards for the destruction of noxious animals, hold fairs and exhibitions

(b) Sec. 32 *ibid.*

(c) Sec. 139. *ibid.*

and generally to carry out any other local work likely to promote the health, comfort or convenience of the public.

A local board could make due provision for matters transferred to its control and administration by the direction of the district board, but could not incur expenses or undertake liability to any amount exceeding the limit conferred by the district board. Of local boards.

The local board could, with the consent of a union committee, delegate to such committee the management of so much of any road under the management of the local board as may be situated within such union and such union committee would thereupon do all things necessary for the maintenance and repair of the portion of road so assigned to it, and would be responsible to the local board in that behalf (d).

The local board could, with the consent of a union committee, delegate to such committee the execution of any work of sanitation, drainage or water-supply affecting the union (e).

The Lieutenant-Governor could, by order in writing, constitute any village or group of villages into a union; and prescribe for such union the number of members of which the union committee shall consist. Such number was not to be less than five or more than nine. It shall be lawful for the Lieutenant-Governor from time to time to vary or annul such order (f). Constitution of unions.

Such members were elected from among the residents of the union, in accordance with rules made by the Lieutenant-Governor under this Act, and was to constitute the union committee of such union (g).

A union committee as the agent of, and subject to control of the local board would, within the union, have the control and administration of, and be responsible for, all matters except such of those matters as the local board might think fit to take under its direct control and administration (h). Powers of unions

A union committee could not incur expenses, or undertake liabilities to any amount exceeding the limit imposed by the local board (i).

A union committee would, so far as the union fund permits, from time to time, cause the village roads to be maintained and repaired and may do all things necessary for such purpose, and—

- (a) lay out and make new village-roads;
- (b) build and construct new bridges;
- (c) turn, divert, discontinue or set up any village-road or bridge thereon; and

(d) Sec. 110 *ibid.* This section has been amended by sec. 49 Bengal Act V of 1908.

(e) Sec. 115 *ibid.*, but see Sec. 55 of Bengal Act V of 1908.

(f) Sec. 38 *ibid.*

(g) Sec. 39 *ibid.*

(h) Sec. 104 *ibid.*

(i) Sec. 106 *ibid.*

(d) widen, open, enlarge, or otherwise improve any such road or bridges thereon (j).

A union committee would cleanse or repair any public tank, stream, well or drain within the union, and charge the cost of such cleansing or repairing, which shall in no case exceed a sum of one hundred rupees, to the union fund, or, if such fund be not sufficient, levy such cost from persons resident within the union in the manner provided for the levying of the chaukidari-tax under the Bengal Village Chaukidari Act of 1870 or any other Act for the time being in force (k).

The various Acts of the different provinces relating to Local Boards have been re-enacted. See Madras Act XIV of 1920; U. P. Act III of 1906; Assam Act I of 1915; C. P. Act IV of 1920; Burma Act IV of 1921.

In *The President of the Taluk Board, Kundapur v. Burde Lakshminarayana Ramphthi* (l), an agreement between a contractor and a Local Board contained the following terms:- "As I have taken over under contract for Rs. 406 the right to collect the fees on the articles brought for sale in Udipi market from 1st April 1902 to 31st March 1903, I am bound to act according to the following conditions:

If I, my agent, or servant were to act contrary to the above regulations, I shall be liable to pay a fine not exceeding Rs. 50 imposed by the President of the Taluk Board or I am not entitled to object if my gutta is put up for auction again to the loss that may be sustained by the Taluk Board."

Under the terms of the above contract, the President of the Taluk Board imposed on the defendant a fine of Rs. 20 on 4th November 1902 in respect of illegal excessive collections made by his agent. The defendant not having paid the fine, the President instituted a civil suit for the amount of the fine on 4th January 1904. It was held that the penal clauses of sections 162 C and 162 D of the Local Boards Act did not preclude the plaintiff from suing the defendant on his contract.

In April 1911, the Local Government Board, in pursuance of their statutory powers, issued a general order to all local authorities whereby they sanctioned beforehand "any reasonable expense", that might be incurred by any local authority in connection with any local public celebration on the occasion of the King's coronation; and on May 2nd the defendant council passed a resolution that a sum not exceeding three farthings in the pound should be expended out of the rates in carrying out the coronation festivities in the district. The three farthings rate would produce about £240. The Attorney-General, at the relation of certain rate-payers, brought an action against the local authority to restrain them from paying the £240 out of the rates on the ground that such payment would be *ultra vires* and illegal, and

(j) Sec. 109 *ibid.*

(k) Sec. 117 *ibid.*

31 Mad. 54.

applied for an interim injunction pending the trial of the action. It was held that it was not a case for an interlocutory injunction (*m*).

Section 23 of the Public Health (Amendment) Act, 1907, provides that "the making of any addition to an existing building by raising any part of the roof, by altering a wall, or making any projection from the building but so far as regards the addition only...shall be deemed to be the erection of a new building." A bye-law of a rural district council required that "every person who shall erect a new domestic building shall provide in the rear of such building an open space exclusively belonging to such building." The governors of a school within the area of the district council proposed to add to one of the masters' houses a projection, three storeys high, containing a room on each floor. By virtue of section 23 aforesaid this addition was to be deemed a "new building" within the Public Health Acts and the bye-laws made in pursuance thereof by the rural district council. The council refused to approve plans for the work on the ground that the addition did not comply with the above bye-law as to the provision of an open space in the rear of the new buildings. The school governors contended that it was impossible to provide an open space in the rear of new building which consisted of an addition to an existing building, and that the bye-law was unreasonable and *ultra vires*. It was held, that the bye-law was unreasonable and bad (*n*).

The owners of frontages on certain roads agreed with the urban authority, by deed made in 1879, that from January 1st, 1880, the roads should be dedicated to the public, and should be accepted by the urban authority as public highways repairable by the inhabitants at large, and should be maintained and repaired accordingly, and that the urban authority should be at liberty to plant trees, and to erect and maintain seats for public use thereon, and to do all other acts, and to exercise all other powers, under a Local Act of 1855, and the Public Health Act, 1875. It was, however, in and by the said deed, further agreed that the urban authority was to retain and have the same powers of requiring the frontagers, so soon and to such extent only as their lands should be actually occupied for building purposes, to sewer, level, pave, etc., such of the said roads as should for the time being not be sewered, levelled, paved, etc., to the satisfaction of the urban authority, and such powers of executing and of recovering expenses, and of taking proceedings in relation to the matter aforesaid, as the urban authority would for the time being have or be capable of exercising under the Public Health Act, 1875, or the Local Act, if the said roads had, for the time being not been accepted by the urban authority as public highways, and were not highways repairable by the inhabitants at large. The corporation, which had adopted the Private Street Works Act, 1892, sued a successor in title of one

Agreement to repair highways.

(*m*) *Attorney-General v. East Barnet Valley Urban District Council*, 75 J. P. 484; *Attorney-General v. Merthyr Tydril Union*, (1900) 1 Ch. 516 applied.

(*n*) *Repton School Governors v. Repton Rural Council*, 87 L. J. (K. B.) 897=(1918) 2. K. B. 133.

of the frontagers on one of the said roads, under sec. 14 of that Act, for the apportioned expenses of private street works executed on the road. The frontagers had taken no objection to the provisional or to the final apportionment under secs 7 and 12 of the Act. It was held that if the meaning of the deed was that the roads were, as between the parties, to be deemed highways repairable by the inhabitants at large, and that—by implication—the corporation undertook not to put in force the Private Street Works Act, 1892, against the frontagers, it was *ultra vires*. If the deed had no such meaning, it was no bar, in the present case to proceedings under sec. 14 of that Act (o).

Under The Village Panchayets Acts panchayets have been constituted for providing for the requirements of small areas in respect of water supply, sanitation and other works of public utility (p).

The Local Boards, District Boards and Municipalities set up under different Self-Government Acts in the different Provinces during the British Rule reflected the objectives of political decentralisation of powers.

Rural development in Independent India. With independence of the country and the merger of Indian States in the Union of India necessities were felt for a thorough reorientation of these institutions in respect of their constitution and functioning mainly in the rural areas. Mahatma Gandhi frequently remarked that if the villages perish India would perish. Rural development was the basic theme of the Congress Government and Art 40 of the Constitution of India provides: The State shall take steps to organise village panchayets and endow them with such power and authority as may be necessary to enable them to function as units of self Government. According to Mahatma Gandhi his ideal village "will contain intelligent human beings. They will not live in dirt and darkness as animals. Men and women will be free and able to hold their own against any one in the world. No one will be idle, no one will wallow in luxury". There were panchayeti raj in ancient villages and its revival was recommended by the Asoka Mehta committee appointed by the Central Government. Entry 5, List II of the 7th Schedule of the Constitution makes Local Government, that is to say, the constitution and powers of municipal corporations, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration State subjects. Accordingly, different States have passed Zilla Parishad Acts and Panchayet Acts and they have been functioning in the rural areas of the country. Gram Panchayets, Panchayet Samitis and Zilla Parishads are elected bodies, democracy having thus been taken to the grass root level. A district has been divided into several Blocks, each Block comprising of a number of contiguous villages and constituting a Panchayet Samiti. A gram is made of several contiguous mouzas. The duties of the Gram Panchayets would be to provide sanitation, conservancy and drainage, take preventive measures in respect of malaria, cholera

(o) *Folkestone Corporation v. Rook*, 71, J. P. 550.

(p) See Bom. Act IX of 1920 and Mad. Act XV of 1920.

or any other epidemic, maintain and construct public roads, remove encroachments, impose, assess and collect taxes, rates and fees imposed by the Panchayeti Statutes, manage public ferries, bring waste lands under cultivation and encourage grow-more-food campaign, arrange for co-operative management of land and other sources of the village, assist in implementation of land reform measures. The Panchayet Samitis shall exercise general powers of supervision over the Gram Panchayets in the Blocks. The administration in the district level is with the Zilla Parishads. Powers of the Zilla Parishads are very extensive. They are to undertake schemes and adopt measures for the development of agriculture, livestock, industries, co-operative movement, rural credit, water supply, irrigation, public health, primary, secondary and adult education, undertake execution of work entrusted to it by the State Government, maintain village huts and markets, adopt measures for relief of distress, advise State Government on matters relating to development work of Gram Panchayet and Gram Samitis. The Zilla Parishads can also direct the Gram Panchayets and the Gram Samitis to execute some of the development work. These Parishads also exercise general powers of supervision over the Panchayets and Samitis in the district and it shall be the duty of these authorities to give effect to any directions of the Zilla Parishads on matters of policy or planning for development. Funds of a Zilla Parishad is made up of contributions and grants by Central or State Government and those by Panchayets and Samitis, proceeds of road cess and public works cess, tolls, rates and fees etc. Such decentralisation undoubtedly helps in quick decisions and in executing them and thereby promoting a high sense of responsibility.

In 1773, the Court of Directors declared their resolution "to stand forth as a power and by the agency of the Company's servants to take upon themselves the entire care and management of the Revenue". In consequence of this resolution, the duties of administration were transferred to the servants of the Company and the system of government through the Nawab's officials, subject to English supervision, was abandoned. The Company appointed Collectors of the Revenue in each district with additional powers of supervision of the Muzaffi Dewani Adalat or provincial Courts of Civil Justice. A Committee of Revenue, which soon afterwards assumed

BOARD OF REVENUE

THE grant of the Dewanny by King Shah Alum to the East Indian Company on the 12th of August 1765 is generally regarded as the acquisition of sovereignty by the English in India. But the meaning of grant, in theory, was thus expressed by the Court of Directors, "we conceive the office of Dewan should be exercised only in superintending the collection and disposal of the revenues. This we conceive to be the whole office of the Dewan." Under that grant the East India Company engaged "to be security for the sum of 26 lakhs of rupees a year for our royal revenue and regularly remit the same to the royal circar; and in this case, as the said Company are obliged to keep a large army for the protection of the Provinces of Bengal, etc., we have granted to them whatsoever may remain out of the revenues of the said provinces, after remitting the sum of 26 lakhs of rupees to the royal circar and providing for the expense of Nizamut" (a).

The East India Company thus became responsible for the collection of the revenue in the provinces of Bengal, Behar, Orissa. In the beginning a resident at the Nawab's court inspected the management of the Naib Dewan, and the Chief of Patna superintended the collections of the province of Behar. The Zamindary lands of Calcutta and 24-Pargunnas and the ceded districts of Burdwan, Midnapur and Chittagong, which had been granted earlier by the Nawab of Bengal, were superintended by the conventioned servants of the Company. In 1769, European local supervisors were appointed with power of superintending the native officers collecting the revenue or administering justice and in the next year two revenue councils of control, with superior authority, were established at Moorshedabad and at Patna (b).

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(a) See Aitchison's Treaties (India), p. 6.

(b) Fifth Report, I. 4.

the name of a Board of Revenue, was created, consisting of the Governor and four members of the council and the treasury was removed from Moorshedabad to Calcutta (c). This was the scheme which was introduced by Warren Hastings, Governor of Bengal, in 1772.

In 1773, an Act of Parliament was passed "for establishing certain regulations for the better management of the affairs of the East India Company, as well in India as in Europe," commonly called the Regulating Act. In consequence of this The Regulating Act. Act, numerous alterations were made in the scheme of Warren Hastings. In 1775, the superintendence of the collection of revenue was vested in six provincial councils appointed for the respective divisions, Calcutta, Burdwan, Dacca, Moorshedabad, Dinajepore and Patna. In pursuance of the legislative authority conferred by the Regulating Act, regulations were passed in 1780, by the first of which (d), the jurisdiction of these six provincial councils was confined exclusively to revenue matters; that is, all cases regarding revenue or rent were reserved for the exclusive cognisance of these councils or of the Collectors who superseded them (e).

In 1786 Lord Cornwallis became Governor-General of India. To carry out the object of Parliament as expressed by an Act of 1784(f), the Court of Directors instructed the new Governor-General "to establish permanent rules for the settlement and collection of the revenue and for the administration of justice founded on the ancient laws and local usages of the country." In pursuance of these instructions, a union of civil and revenue jurisdictions was effected. A revised Code of Judicial Regulations was issued under which all revenue cases were assigned to the Collector, from whom an appeal lay to the Board of Revenue, and ultimately to the Governor in Council (g). But in consequence of a change of policy in 1793 (h), Lord Cornwallis returned to the system of separation of fiscal and judicial system, and by Regulation II of 1793 the Collectors were entrusted with the collection of revenue as executive officers subordinate to the Board of Revenue.

Scheme of Lord Cornwallis.

By Regulation III of 1822 three Boards of Revenue were separately constituted for the Lower, Central and Western Provinces respectively (i). By Regulation I of 1829 Commissioners of Revenue and Circuit were appointed over districts grouped into twenty divisions and in them were vested the powers formerly exercised by the Board of Revenue and a Sadr or Head Board of Revenue was constituted at the Presidency with

Later history of the Board of Revenue in Bengal.

(c) Fifth Report, I. 5, 21.

(d) Reg. I of 1780, section 3.

(e) Harrington's Analysis, I. 31; Fifth Report, I. 10.

(f) 24 Geo. III. c. 25.

(g) Harrington's Analysis, I. 32.

(h) Harrington's Analysis, I. 42.

(i) This provision was formally repealed by Act XVI of 1874.

power of control and direction over the Commissioners. By Act XLIV of 1850, this Sadr Board of Revenue came to be styled as the Board of Revenue for the Lower Provinces of the Presidency of Fort William in Bengal. After the partition of Bengal and the Constitution of the province of Eastern Bengal and Assam a Board of Revenue was likewise formed for that province with powers similar to those exercised by the Board of Revenue of the Lower Provinces of Bengal (j).

In the United Provinces of Agra and Oudh (k), the Board of Revenue is the Chief Controlling Authority and its general powers are mentioned in U. P. Act III of 1901 and these are almost similar to those exercised by the Board of Revenue in Bengal.

In the territories subject to the Government of Fort St. George, the superintending management of the affairs of revenue appears to have been conducted by the President and Council without the aid of a subordinate establishment until the year 1780, when a Board of Revenue was constituted at Fort St. George on the plan of the Committee of Revenue then existing at Calcutta. This was done in pursuance of the prescription of the Act of 1784 and of the instructions issued to the Government of Fort St. George in conformity, thereto. By Regulation I of 1803, the Judicial authority of the Board of Revenue was formally abrogated and its duties and powers in the matter of revenue were defined. These powers were to some extent supplemented by Madras Act I of 1894.

The powers and functions of the Board of Revenue in Bengal are scattered over a number of old Regulations. Except to the extent to which those Regulations have been repealed, they are still on the statute-book. Under Regulation II of 1793 "the Board of Revenue is held at the seat of Government, it has a secretary, with assistant translators and other officers, European and Native. In this Board is vested the general control over the Collectors of land revenue, with authority to superintend their proceedings and to suspend them from their offices if negligent in the performance of their duty. Their own proceedings are in like manner subject to the superintendence of the Government, and the orders of Government in this department are circulated through the Board of Revenue to the Collectors. The Board of Revenue is constituted a 'Court of Wards', with power to control the conduct and inspect the accounts of those who manage the estates of persons disqualified by minority, sex or natural infirmity for the administration of their own affairs. The Board may make periodical reports to Government on the State of revenues and their proceedings were transmitted through the Government to the Court of Directors (l). By Regulation IV of

(j) See Act VIII of 1905, Section 4.

(k) For the recognition of this designation. See Act VII of 1902.

(l) Fifth Report, I. 43-44.

1821 the Board of Revenue was empowered to depute any of the officers subordinate to its authority to exercise and perform all or any of the powers and duties ordinarily vested in Collectors. Under Regulation III of 1822 any single member may separately, if so authorised, exercise part of the duties; the decision of any question shall be determined according to the majority of the voices; in the case of officers immediately subordinate to the Board no final orders regarding appointment, removal or punishment can be passed without the concurrent judgment of two or more members; and the Board may review, rescind, alter or confirm any order or decision passed by them in cases meriting further investigation.

Besides the powers specifically mentioned in these Regulation, Boards of Revenue have various other powers (*m*) over chartities (*n*) and over estates of wards (*o*) and as a tribunal of appeal and revision (*p*). They can make rules (*q*) under various Acts consistent with the provisions thereof. So long as the rules framed and the powers exercised are within the limits and in the manner provided by the legislature, they will be valid, but if otherwise, will be *ultra vires*.

Powers under special Acts.

Boards of Revenue have been reconstituted in Bengal and Bihar and Orissa by the Bengal Act III of 1913 and Bihar and Orissa Act I of 1913.

It is not within the competence of the Board of Revenue to cancel or revoke a certificate issued by a Collector under the Pensions Act (XXIII of 1871). Rules issued by the Government and printed at page 125 of the Boards Standing Orders cannot be considered as rules framed under section 14 of that Act.

Sadasiva Aiyar, J., said: "Those rules do not refer to section 14 and they do not state that they were framed by the Board of Revenue with the Consent of the Government. Of course, there is a presumption that all official acts have been done in accordance with the law, and if those rules declare that they were framed by the Board of Revenue under section 14, we might presume that the consent of Government had also been obtained for the rules so framed. Or, if section 14 says that, after the Government has given its consent to the rules framed by the Chief Controlling Revenue Authority, that is, the Board of Revenue, they should be issued by the Government, then if the Government issues some rules, we might presume that they were framed by the Board of Revenue with the consent of

(*m*) See Ben. Act VII of 1864; Reg. II of 1819. And Mad. Acts II of 1864; VI of 1867; II of 1904.

(*n*) Ben. Reg. XIX of 1810; Mad. Reg. VII of 1817. In respect of endowments for the support of mosques, Hindu temples, or other religious purposes, the Religious Endowments Act (XX of 1863) has repealed these regulations.

(*o*) Ben. Act IX of 1879; Mad. Act. I of 1902; U. P. Act III of 1899.

(*p*) Ben. Acts VIII of 1865; V of 1875; III of 1875; VIII of 1876; I of 1879; VII of 1880; IX of 1880; XI of 1859; Regs. V of 1812; VII of 1822; XII of 1817; and Mad. Acts. XII of 1857; VII of 1865; II of 1894; III of 1895, III of 1905.

(*q*) Ben. Acts V of 1875, VII of 1876; VIII of 1876; VII of 1878, IX of 1879; IX of 1880; and Mad. Acts II of 1894; III of 1896; I of 1902.

the Government and issued according to the statute. But when section 14 is silent as to the issuing of any rule by the Government, the mere recitation in the Board's Standing Orders that certain rules have been issued by the Government cannot raise a presumption that they were framed by the Board of Revenue with the consent of the Government. I am, therefore, inclined to hold that these rules are *ultra vires* and the Collector's certificate is valid without the sanction of the Government" (r).

Under the Standing Order XV, cl. 16 of the Madras Board of Revenue, a Deputy Collector is empowered to cancel the grant, if at any time within three years of the date thereof, he is "satisfied that the decision was passed under a mistake of fact." When therefore the Tahsildar makes a grant under the mistaken impression that the plaintiff's *darkhast* is only for a portion of the survey field, while in fact it is for the whole, the Deputy Collector's order cancelling the grant is *ultra vires* (s).

Under sections 65 and 66 of the Land Revenue Code (Bom. Act V of 1879) an occupant of land *appropriated for purposes of agriculture* can under certain circumstances be summarily evicted by the Collector. When therefore the land was not used for agricultural purposes, the sections have no application, the order and notice of ejection are *ultra vires* of the Revenue authorities, because "it is not possible to attribute the order or the notice to any section of the Land Revenue Code under which the Revenue authorities can be said to have the power to evict the present plaintiffs from the land in dispute" (t).

- (r) *Subbarow v. Ramarow* 18. I. C. 353.
 (s) *Devaramani Bhogappa v. Pedda Bhimaka*, 28 I. C. 51.
 (t) *Rasulkhan v. Secretary of State*, 39. Bom. L. 495.

COMPANIES—I

In the year 1882, it was thought expedient to amend the law relating to the incorporation, regulation and winding up of trading companies and other associations and for that purpose the Indian Companies' Act (VI of 1882) was passed. It laid down the constitution and incorporation of companies and associations, prescribed rules for the distribution of the capital and liability of members, provided for the management and administration and contained the procedure for winding them up voluntarily or through the assistance of the court.

Indian Companies Act.

That Statute had provided that no company, association or partnership consisting of more than ten persons could be formed for the purpose of carrying on the business of banking, unless it was registered as a company under this Act, or was formed in pursuance of an Act of Parliament or some other Act of the Governor-General in Council, or by Royal Charter or Letters Patent; and no company, association or partnership consisting of more than twenty persons could be formed for the purpose of carrying on any other business that had for its object the acquisition of gain by the company, association or partnership or by the individual members thereof, unless it was registered as a company under this Act, or was formed in pursuance of some other Act or of Letters Patent (a).

Limitation of partnerships.

A joint-stock company shall be deemed to be a company having a permanent paid up or nominal capital of fixed amount, divided into shares, also of fixed amount, or held and transferable as stock, or divided and held partly in one way and partly in the other, and formed on the principle of having for its members the holders of shares in such capital or the holders of such stock, and no other persons; and such company, when registered with limited liability under this Act, should be deemed to be a company limited by shares (b).

Joint-stock companies

Any seven or more persons associated for any lawful purpose might by subscribing their names to a memorandum of association and otherwise complying with the requisitions of this Act in respect of registration form an incorporated company with or without limited liability (c).

Mode of forming company.

The memorandum of association must declare among other things

(a) Act IV of 1882, sec. 4.

(b) Sec. 226, *ibid.*

(c) Sec. 6, *ibid.*

the objects for which the proposed company is to be established (d). Memorandum of association

The powers of a company depended on its memorandum of association (e). The objects must be set out with reasonable clearness and it was not sufficient if a large number of very wide powers were mentioned as such objects (f). The powers of a company to transact business were restricted to the objects specified in the memorandum and any act which was beyond the objects so specified was *ultra vires* (g). But an act which was within the memorandum but forbidden by the articles might be ratified by the shareholders (h), though a contract which was *ultra vires* the memorandum was wholly void and could not be validated as against the corporation even though it was assented to by every individual member of the corporation (i).

When a company was formed with the object of doing the business of commission agency and general trading in cotton, &c., and when its memorandum laid down "if found desirable, the company may effect purchases of cotton and produce in Bombay and ship to England and carry on such local trade as may seem profitable," it was held that the memorandum did not justify the directors in dealing in the shares of other companies and that it was *ultra vires* (j). Where the memorandum of association authorised the company to acquire gold mines in Mysore and elsewhere, and the company gave up its mining operation in Mysore the provision for the acquisition of gold mines "elsewhere" would not enable it to work gold mines on the Gold Coast (k).

Where the objects of a company were stated to be the purchase of the business of hotel-keeper, confectioner and provisioner, the future working and carrying on of the said business and the doing of all such things incidental or conducive to the attainments of the above objects, it was held that the directors had powers to bind the company by the issue of negotiable securities in the ordinary course of business (l).

If the *articles* empowered the directors to deal with the profits either by declaring a dividend or appropriating it to the reserve fund, the directors could add to the existing reserve fund a portion of the profits though it might have the effect of diminishing the amount of dividend which they could otherwise have declared (m). Where the articles of association of a limited company authorised its directors to borrow on bond, mortgage, or other security, or otherwise up to a certain limit, with the sanction of the share-

(d) Sec. 8, 9, *ibid*.

(e) *Shamnugger Jute Factory Co. v. Ramnarain*, I. L. R. 14 Cal. 189.

(f) *In re German Dute Coffee Co.*, 20, Ch. D. 169.

(g) *Ashbury Carriage Co v. Riche*, 7 H. L. 653.

(h) *Irvine v. Union Bank of Australia*, 2 A. C. 366. *Dixon v. Evans*. L. R. 5 H. L. 606.

(i) *Wenlock v. River Dee Co.*, 36 Ch. D. 675; *Towers v. African Tug*, (1904), 1 Ch. 558. See also *G. N. W. C. Railway Co. v. Charlebois*, (1899) A. C. 114.

(j) *Kathiawar Trading Co. v. Virchand Dipchand*, I. L. R. 18 Bom. 119.

(k) *Stephens v. Mysore Reef, etc.*, (1902) 1 Ch. 745.

(l) *Choonilal v. Spence's Hotel Co.*, 1 B. L. R. (O. C.) 14.

(m) *B. B. Trading Corporation, Ltd. v. Dorabji*, I. L. R. 10 Bom. 415.

holders, it was held that the power justified a mortgage, the object of which was in part to cover previously incurred liabilities, provided the principal amount of the loan did not exceed the limit fixed in the power (n). Where the memorandum of association contained a condition that A and B and their representative were to be secretaries, but the emoluments and powers of the secretaries were set out in the articles of association, it was held that that portion of the articles of association could not be read as part of the memorandum of association so as to preclude its alteration by special resolution under section 76 (o). It was beyond the powers of the directors to cancel shares duly allotted to a share-holder at his request and such cancellation amounted to a reduction not authorised by the Act and was illegal (p).

In *Bhimbhai v. Ishwardas Jugjiwandas* (q) the Nawab of Beyla Spinning, Weaving and Manufacturing Company, Limited, was registered under the Indian Companies Act (x of 1866). The original capital of the company consisted of Rs. 4,00,000 divided into 1,600 shares of Rs. 250 each. In 1882 the capital of the company was increased by Rs. 1,00,000 divided into 1,600 shares of Rs. 62-8. The resolution to increase the capital was not passed in accordance with the articles of association, i.e., "with the sanction of a special resolution of the company passed at a general meeting." On the 5th November 1884 a resolution was passed at a general meeting of the company that the share-holders should take up the 459 shares of the original capital and 1,027 shares of the increased capital, which were then in the hands of the company, in the proportion of one share to every two shares already held by them. In pursuance of this resolution the appellants took up several shares of the original capital as well as of the new capital. On the 19th October 1885 a general meeting of the company was held at which it was resolved that the resolution of the 5th November 1884, and all acts done in connection with it should be set aside, that the shares taken by the share-holders in pursuance of that resolution should be taken back by the company, and such amounts as had been paid by them on those shares should be credited to their names in the company's books. This was accordingly done, and the shares were transferred to the name of the company. In October 1886, the company was wound up by order of the court. In settling the list of contributories, the district judge of Surat held that the appellants were liable, as contributories, in respect of all the shares which they had taken up in pursuance of the resolution of the 5th November 1885. On appeal from this decision, it was held that with respect to the shares of the original capital the resolution of the 19th October 1885, was illegal and invalid; it operated not as an investment by the company of its funds in its own shares but as an *extinguishment of the shares*, and such extinguishment was virtually a reduction of the capital, which could not be done without complying with

(n) *Kernot v. Walton*, I. L. R. 9 Cal. 14.

(o) *Chidambaram v. Krishna Aiyengar*, 5 M. L. T. 290

(p) *Sorabji v. Ishwardas*, I. L. R. 20 Bom. 654.

(q) I. L. R. 18 Bom. 152

the provisions of section 13 of the Indian Companies Act (VI of 1882); the holders of such shares were, therefore, properly placed on the list of contributories. It was also held that the issue of the shares of the new capital had not been come to in accordance with the articles of association so that it was open to the company to set aside the resolution of the 5th November 1884, and when it was set aside the persons who held the new shares ceased to be share-holders and could not be held liable as contributories.

A company was to maintain a Register and enter therein the names of the transferees of shares and had power to close the Register.

The Bank of Bengal was held entitled to refuse to register a transfer of shares when the application was made during the time the transfer books of the Bank were closed under the powers of section 21 of Act XI of 1876 and after notification in accordance therewith (r). Where the directors passed a resolution on the 1st October "that up to the time of the next ordinary general meeting, the board approve of all transfers of shares from Dwarkadas Shamji and Ramdas Kessowji or either of them and the company will transfer the shares standing in their names to the transferees without claiming any lien or without raising any objections," the resolution was *ultra vires* and not binding on the company (s).

Apart from Sec. 27 of the Act dividends could not be paid out of capital, and any such payment is an *ultra vires* act on the part of the directors of a company and constitutes a breach of trust, rendering them liable to make good to the company any amount so paid (t).

Under section 21 of the Specific Relief Act (u) (1 of 1877) a contract made by or on behalf of a corporation or public company created for special purposes or by the promotees of such company, which is in excess of its powers could not be specifically enforced. As an illustration, if a company existing for the sole purpose of making and working a railway contracts for the purchase of a piece of land for the purpose of erecting a cotton mill thereon, the contract could not be specifically enforced.

No contract can bind a company, which had been entered into with regard to it, when as yet it had no existence. Even if such contract was embodied in the articles of association, it could bind the company when formed, unless it had, after its formation, ratified and adopted it (v).

The authority to contract on behalf of a company could be express or implied. Directors and managers had in some companies express authority

(r) *Mothoormohun v. The Bank of Bengal*, I. L. R. 3 Cal. 392.

(s) *In re New Great Eastern S. and W. Co.*, I. L. R. 23 Bom. 685.

(t) *Re Oxford Benefit Building &c., Society*, 35 Ch. D. 502; *Flitcroft's Case*, 21 C. D. 519; *Masonic &c., Assurance Co. v. Sharpe*, (1892) 1 Ch. 154.

(u) Sec. 67. Sec. 21 has been replaced by sec 14 of the Specific Relief Act (47 of 1963) making sweeping changes therein. Reference may also be made to sec 46 of the Companies Act, 1956 relating to forms of contracts by Companies.

(v) *Imperial Flour Mills Co. Ltd. v. W. T. Lamb*, I.L.R. 12 Bom. 647; *Imperial Ice Manufacturing Co., Ltd. v. Munchershaw*, I. L. R. 13 Bom 415; See also *Gujarat S. & W. Co. Ltd. v. Girdharlal*, I. L. R. 5 Bom. 425.

to contract on their behalf and such authority would be implied with regard to all matters in the ordinary course of business (w).

When the articles of association of a certain company authorised its directors to borrow, from time to time, in the name of the company, such sums of money 'by bonds, debentures, or promissory notes, or in such other manner as they deem best,' it was held that, although the power to borrow money on bill of exchange was not specifically given, yet, they, being in many respects analogous to promissory notes, must be deemed to be included in the general words "or in such other manner as they deem best" (x). Where the company had no power to issue bills of exchange or accept re-drafts, the holders of those drafts which had been, in fact, accepted were in no better position than the holders of unaccepted ones (y).

An authority empowering the agents to "draw, endorse and negotiate on behalf of the company all such cheques as should be necessary for enabling them to carry on the company's business did not empower them to accept bills drawn on the company (z).

So far as third parties were concerned a company under this Act could be made liable on a bill or note only when such bill or note on the face of it expressed that it was made, accepted, or endorsed by, or on behalf of, or on account of, the company, or where that fact appeared by necessary inference from what the face of the instrument itself shows.

The addition to the signature of individuals as makers, drawers, acceptors or endorsers of notes or bills, of their description as director or secretary, treasurer and agent of a certain company, was not considered to raise such inference, as it did not exclude the supposition that though described as directors, etc., they had intended to make themselves personally liable to holders of the instrument, though, as between themselves and the company, they might be entitled to be indemnified for anything they might have paid on account of the company in respect of such notes or bills (a).

No company under this Act had power to buy its own shares. A purchase by a Bank of its own shares was *ultra vires* and was not a legal transaction. The Official Liquidator was competent to raise pleas going behind the deposit receipt and he was not bound to question the validity of the purchase by a proceeding under the Companies Act or by a regular suit as the transaction was wholly void and *ultra vires* and did not require to be specially set aside. Neither acquiescence nor ratification by the head manager could validate the same so as to bind the share-holders who had no notice of the same (b).

Power to buy own shares.

(w) *Re Cunningham & Co.*, 36 Ch. D. 532.

(x) *In re New Fleming S. & W. Co.*, I.L.R. 3 Bom. 439.

(y) *In the matter of the Post Canning & Co., Ltd.*, 7 B. L. R. 583.

(z) *The Oriental Bank Corporation v. The Boree Tea Co. Ltd.*, I. L. R. 9 Cal. 380.

(a) I. L. R. 3 Bom. 439, following *Dutton v. Marsh*, L. R. 6 Q. B. 361.

(b) *Transon v. Official Liquidator Punjab Bank*, 38 P. R. 1881.

In *Jehangir Restamji v. Shamji Ladha* (c) it was held that the purchase by the directors of a joint-stock company on behalf of the company, of shares in other joint-stock companies, unless expressly authorised by the memorandum of association, was *ultra vires* and that a joint-stock company, even though it be empowered by its memorandum of association to deal in the shares of other companies, was not thereby empowered to deal in its own shares, and a purchase by the directors of the company of its own shares on behalf of the company was, therefore under such circumstances *ultra vires*. Referring to some English cases, the learned judges said:

"In the case of *Evans v. Coventry* (d), before Vice-Chancellor Kindersley, which was a suit by certain persons assured in the General Life Assurance Company to compel the directors to restore the capital expended in the purchase of shares of the company, the Vice-Chancellor seems to have assumed that, as there was no express authority to the directors to buy shares for the company, the purchases were *ultra vires* and then proceeds to give other reasons, having special reference to the relation of trustee and *cestui que trust* which he had previously decided was created between the directors and the insured. In *Spackman's Case* (e), before Lord Westbury, and in *Stanhope's Case* (f) before Lord Cranworth, it was assumed that the sales to the directors, unless they could be regarded as effected under the power to compromise were *ultra vires*, and the important question was whether the company was estopped by lapse of time and by other circumstances from disputing the validity of the sales."

The business of the company was to be managed by the directors who were bound to strictly obey certain terms and conditions provided in Sch I to the Act but the general authority of directors acting as a board extended to all acts reasonably necessary for management (g). When the articles provide that the directors shall not have power to do a certain act, any resolution of the company authorising the company to do such acts must be by a special resolution altering the articles. But if the directors did such an act without authority, the company could by ordinary resolution adopt the act so that it would become binding on the company (h).

In the matter of *the New Great Eastern Spinning & Weaving Co. Ltd.* (i), by the articles of association of the new Great Eastern Spinning & Weaving Company transfer of shares in the company were subject to the approval of the directors. On the 18th October 1898, the directors passed a resolution "that up to the time of the next ordinary general meeting the Board approve of all transfers of shares made by Dwarkadas Shamji and Ramdas Kessowji

(c) 4 B. H. C. R. 185.

(d) 25 L. J. (Ch.) 489.

(e) 34 L. J. (Ch.) 321.

(f) (1865) 1 Ch. App. 161 (169)

(g) *Re West of England Bank Exp. Booker*, 14 Ch. D. 317.

(h) *Grant v. United Kingdom Switchback Ry. Co.*; 40 Ch. D. 135.

(i) 1. L. R. 23 Bom. 685 following Bennett's case, 5 De G. M. & G. 284.

(two of the shareholders) or either of them, and ... will transfer shares standing in the name of Dwarkadas Shamji and in the name of Ramdas Kessowji to their or his transferees without claiming any lien or raising any objection." It was held that the above resolution was *ultra vires* and not binding on the company. The power conferred on the directors by the articles of association was a fiduciary power to be exercised for the benefit of the company, and could not be exercised until the question of each transfer, together with the names of the transfer and the transferee, was before them and they had an opportunity of considering each case. The ratification by a company of particular acts done by its directors in excess of their authority did not extend the powers of the directors so as to give validity to acts of a similar character done subsequently (j).

In *Ashbury Carriage Company v. Ritche* (k), the question was discussed at great length and a distinction was drawn between acts *ultra vires*, not only of the directors of the company but of the company itself and acts which are *extra vires* the directors, but *intra vires* the company. The first cannot be ratified, because they are beyond the powers given by law, either as being against public policy or prohibited by statute, or because their admission would be unjust to the public, or because they are inconsistent with, or foreign to, the object expressed in the memorandum of association. The second class applies to cases where the directors have gone beyond the powers entrusted to them; but still the acts are not beyond the objects of the memorandum of association, and may be validated by the sanction of the company. This second class is capable of ratification. Where, under the articles, the directors were empowered, before recommending a dividend, to set aside out of the profits of the company, as they thought proper, a reserve fund, and the disposal of profits was entirely entrusted to them to allow the shareholders to deal with them would be a direct contravention of the article. Nor could the shareholders decide the question as to the amount of the dividend. The remedy of the shareholders, if they were dissatisfied with the directors, was to remove them from office, or to alter the articles of association (l).

A forfeiture of shares which is not illegal as in contravention of any statute but may have been *ultra vires* the directors as being unauthorized by the articles, may be made good if it be shown that every individual shareholder had knowledge of and acquiesced in the transaction (m). If a forfeiture be *ultra vires* no lapse of time alone can render it valid:—*Quod ab initio non valet in tractu temporis non convalescit* (n). As regards a forfeiture which is *ultra vires* the directors, "if a declaration of forfeiture proceeds upon and is the result of a collusive agreement, but is entered by the directors in the

(j) *Irvine v. Union Bank of Australia*. 2 A. C. 366.

(k) 7 H. L. 653. *The New Fleming, S. & W. Co., Ltd. v. Kessowji Naik*, I. L. R. 9 Bom. 373.

(l) *The B. B. Trading Corp. Ltd. v. Dorabji*, I. L. R. 10 Bom. 415.

(m) *Brotherhood's Case*, 31 L. J., (Ch) 861.

(n) *Spackman v. Evans* L. R. 3 H. L. 171.

books of the company as if it were a *bonafide* adverse proceeding, the entry is a false statement involving a fraudulent concealment of the truth, for the suppression of the truth is a form of falsehood, and falsehood is fraud, and it is impossible under such circumstances of imposition on the other shareholders, that the shareholder who sets up the foreclosure can make a case of acquiescence or derive any benefit from lapse of time whilst the truth remains unknown" (o).

Directors were responsible for the management of their company. Where, by the articles of association, the business was to be conducted by the Board with the assistance of an agent, they could not divest themselves of their responsibility by delegating the whole management to the agent and abstaining from all enquiry. If he proved unfaithful under such circumstances, the liability was theirs, just as much as they themselves had been unfaithful (p).

Delegation. THE Indian Companies Act, 1882, was replaced by Act VII of 1913. This Act was amended by Acts X and XI of 1914, XI of 1915, XLII of 1920 and replaced in part by Act XLVII of 1920.

The Indian Life Assurance Companies Act (VI of 1912) regulated the Life Assurance Companies and applied to all persons or bodies of persons who carried on life assurance business in British India.

The Provident Insurance Societies Act (V of 1912) provided for the regulation of Provident Insurance Societies. A Provident Insurance Society means any person or body of persons whether corporate or unincorporated which receives premiums or contributions for insuring money to be paid on the birth, marriage or death of any person or on the happening of such other contingency or class of contingencies as may be prescribed. Every society has power to make rules for the disbursement of expenses of management, for payment of debts and for any other matters that may be prescribed.

The Basel Mission Trading Company Act (XXXV of 1910) constituted the trustees appointed in pursuance of the Enemy Trading Act, 1916, into a Body Corporate under the corporate name of the Mission Trust of Madras.

The Enemy Mission Act (IX of 1921) constituted trustees as bodies corporate for the management of various mission institutions mentioned in the Schedule to that Act.

According to the memorandum of association, plaintiff and another, their heirs, executors and administrators were to be secretaries of a Bank, whose duties, powers and emoluments were set out in the articles of association. Plaintiff continued to be the secretary for many years. Later on at a general meeting, the shareholders appointed a new managing agent to whom most the powers of the plaintiff were transferred, modified the articles of association, and curtailed the powers and emoluments of the secretary. Plaintiff then sued the directors of the Bank, and prayed for an injunction

(o) *Per Westbury, L. C., in Spackman's Case*, 34 L. J. (Ch.) 321, 333.

(p) *The New Fleming S. & W. Co., Ltd., v. Kessowji Naik*, I. L. R. 9 Bomb. 373.

restraining them from interfering with the performance of his duties as secretary, contending that the resolution of the share-holders was invalid, since it altered the memorandum of association, and also amounted to a breach of contract by the company with regard to the terms on which he took up the secretaryship. It was held (i) that the resolution of the share-holders did not alter the memorandum of association and was therefore valid; (ii) that the portion of the articles which sets out the powers of the secretary is not a part of the memorandum and is therefore liable to be altered by a special resolution under Sec. 76, and (iii) that the resolution was a valid one, there being no proof of any agreement between the secretary and the company to the effect that the subsequent alteration of the articles should not affect the terms of the contract upon which the plaintiff took up the secretaryship (q).

Where the articles of association of a United Company laid down: "No person shall be appointed, or have authority to act who is not a share-holder in the Company," it was held that to construe the articles as the person appointed to be a share-holder when the proxy is signed is to put too narrow a construction on the words; if an un-qualified person is named in the proxy the nomination is not an appointment, in any effective sense, and his nomination does not become an appointment until he is qualified; in order to act something more is required—he must be qualified not only when he is 'appointed' but also when he acts (r).

Nomination is not
appointment

Where the articles of association provided that the number of directors should be not less than three and also that any casual vacancy occurring on the Board might be filled up by the Board and that the continuing Board might act notwithstanding any vacancy in their Board, and, upon a casual vacancy having occurred, the defendant who had shares allotted to him by the two directors, became subsequently a director and confirmed the resolution to himself and joined in a resolution that the shares allotted to him should be paid in full forthwith, he was held liable to pay the shares allotted to him (s).

Where under a trust deed, a majority of the debenture stock-holders had power to sanction any modification of the rights of the stock-holders as against the company, and the majority passed a resolution agreeing to convert their redeemable stock into irredeemable stock, it was held that the resolution was not *ultra vires*, and was binding on the minority (t).

Articles of an association provided (Article 53) that "the company in general meeting may from time to time . . . increase its capital by the creation of new shares." Article 59 provided that "any new shares from time to time to be created may from time to time be issued with any such guarantee or any such right of preference over any other shares previously issued . . . or at such

Increase of Capital
by New Shares

(q) *N. P. N. M. Chidambaran Chettiayar v. Krishna Aiyangar*, 33 Mad. 36.

(r) *In re Bombay Burma Trading Corporation*, 29 Bom. 126 (P. C.).

(s) *York Tramway Co. v. Willow*, 8 Q. B. D. 685.

(t) *In re Joseph Stocks & Co. Ltd. Witley v. Joseph Stocks & Co. Ltd.* (1913) 2 Ch. 134, n. = 26 T. L. R. 41.

a premium, or with such deferred right as compared with any shares previously issued or then about to be issued, or subject to any such conditions or provisions, and with any such right or without any right of voting, and generally on such terms as the company may from time to time by resolution of a general meeting declare." At extraordinary general meetings of the company, the company passed and confirmed certain special resolutions, among them one substituting the words "by resolution of the directors" for the words "in general meeting" in Article 53. Subsequently the directors passed a resolution to increase the company's capital by the creation of 1,25,000 new shares £1 each. It was held that, even assuming that the resolution of the directors to increase the capital by the creation of new shares was *intra vires*, those shares could not be issued without the sanction of a resolution of a general meeting of the company as required by article 59; that the plaintiff, who was a shareholder of the company and a former director was not precluded from obtaining an injunction restraining the company from issuing the new shares without the sanction of a resolution of a general meeting by the fact that he had been a party to the passing of the resolutions which authorised the increase of capital and had taken shares issued under earlier resolutions (u).

The directors of a company had under the articles of association power to delegate any of their powers to committees consisting of such member or members of their body as they thought fit. B was one of five directors. The other directors were dissatisfied with the manner in which B discharged his functions as director. A resolution was passed at a meeting of directors to the effect that a committee should be appointed to transact all ordinary business of the company and should consist of all the directors except B. It was held that the resolution was invalid, not having been passed in *bonafide* exercise of the powers given to the directors by the articles of association (v). Where a dissentient minority of share-holders in a company seek redress against the action of the majority of their associates, they must, in order to succeed, show that the action of the majority is *ultra vires*, or that the majority have abused their powers and are depriving the minority of their rights (w).

The liquidator of a Bank sued one M for recovery of a certain sum of money on the basis of a promissory note alleged to have been executed by him and one S jointly. It was alleged that M and S, applied for the allotment of certain shares in the Bank, which shares were allotted by the managing director on the 29th June 1911 and notice of the allotment was given to M and received by him on the 5th January 1912. On the 18th January M repudiated the allotment and denied having made any application. It appeared that on 20th November 1908 two directors of the Bank had made a delegation of the power of allotting shares to the general manager, and that

(u) *Mosely v. Koffyfontein Mines Ltd.*, (1911) 1 Ch. 73.

(v) *Bray Smith, v. Smity*, 124 L. T. Jo., 293.

(w) *Dominion Cotton Mills Co. Ltd. v. Amyot*, (1912) A. C. 546; 81 L. J. P. C. 233.

subsequently, on the 27th November 1908 these two (one representing a third director by proxy) together with a third, purported to confirm the decision of the previous week. It appeared further that neither of these two directors had paid their allotment money by that date; It was held, (1) that under the circumstances no proper meeting of the directors could be said to have been held and that there was no valid delegation of the power of allotting shares; (2) that, consequently there was no valid allotment of the shares to the defendant and therefore, there was no consideration for the promissory note; (3) that in any case, it was open to the defendant to revoke his application for the allotment of any shares, provided the revocation was anterior to the date of any valid allotment or ratification by the Board of Directors; (4) that no valid ratification of the invalid allotment before revocation could be said to have been proved; (5) that under the circumstances, the defendant was not liable (x).

The original capital of a company consisted of preference and ordinary shares, the preference shares having a fixed dividend, but no priority as to capital. The company, having power to convert its paid-up shares into stock,

Conversion of Shares
into stocks converted its ordinary shares into ordinary stock at face value, but in converting its preference shares

into preference stock bearing a lower rate of interest it gave the holders extra bonus stock to maintain their former dividends. The company also made direct issue of fully-paid preference and ordinary stock for cash without going through the formality of first issuing fully paid shares and converting them. The company also made direct issue of partly paid ordinary shares and partly paid ordinary stock for cash. All the holders were placed on the register and they received dividends. Many years after these issues were made the company was wound up voluntarily, and after paying all the creditors the liquidator had a balance of surplus assets for distribution among the members.

It was held, (a) that, having regard to the lapse of time, the irregularity in the direct issues of the fully paid preference and ordinary stock must be treated as waived, and the holders were entitled to rank for the full amount of their holding; (b) that the original holders and transferees of preference stock converted from fully paid preference shares could only rank for the amount representing conversion at face value and not for the bonus stock, which was wholly *ultra vires* and must be treated as non-existent; (c) that the holders of partly paid shares were entitled to rank for the amount paid and were subject to a call for equalisation; (d) that the original holders and transferees of partly paid ordinary stock were not entitled to rank at all, as their stock was wholly *ultra vires* and must be treated as non-existent (y).

The appellant company issued 5,000 bonds of £10 each repayable by instalments, on the terms that the company would, when and so far as there were net profits available for the purpose, pay to each registered

(x) *Bank of Peshawar Ltd. v. Madhoram* 51 L. C. 812.

(y) *In re Home and Foreign Investment and Agency Co.*, (1912) 1 Ch. 72.

holder the principal money and £25 by way of bonus. It was declared on the face of each bond that the principal and bonus should be payable exclusively out of net profits. The holder of any ten bonds had the option of converting the principal money into a first mortgage debenture of the company for £100, without prejudice to his right to the bonus. It was also provided that the company might after six calendar months' notice pay off that principal money and bonus. The option of conversion into first mortgage debentures was largely exercised by the bond holders, but £1,25,000 in respect of bonus remained unpaid, the company not having made any profits. The company proposed to extinguish this liability in respect of the bonus by the issue of fully paid shares. It was held that the proposed transaction was *ultra vires* because it was an issue of shares without payment, inasmuch as the consideration for the shares was the release of a charge upon money which did not belong to the company as a corporation, but to the share-holders as individuals (z).

A surrender of shares to a limited company, not involving any reduction of capital and not amounting to a purchase of its own shares by the company, is not necessarily *ultra vires*.

In 1896, pursuant to article of association and special resolution, the holders of 6 per cent, fully paid preference shares surrendered the same to the company in exchange for fully paid 5 per cent preference shares, and a contract in writing was duly filed with the Registrar of Joint-Stock Companies, pursuant to section 25 of the Companies Act, 1867. The surrendered shares were not cancelled, but were subject to be re-issued by the company. It was held that the surrender not involving and reduction of capital was valid; that the transaction did not amount to a purchase by the company of its own shares; and that the new shares issued in exchange were fully paid-up (a).

Acts *bona fide* done by a director or manager of a company are valid notwithstanding any defect that may afterwards be discovered in his qualification, and this not between the company and outsiders, but also between the company and its members.

A chairman who presides over a meeting of a company is neither wholly a ministerial officer nor wholly a judicial officer; his duties are of a "mixed nature" and he is not liable to be mulcted in damages, if, acting *bona fide* according to the best of his judgment and without malice, he erroneously excludes a share-holder from voting and also declare him to be ineligible as a director of the company.

A share holder, who has been wrongfully refused the right of voting or of election as a director, cannot maintain an action for damages against the chairman of the company without alleging and proving that the latter

(z) *Famatina Development Corporation Ltd. and others v. Bury* (1901) A. C. 439; 79 L. J. (Ch.) 597.

(a) *Rowell v. John Rowell & Sons, Ltd.*, (1912), 2 Ch. 609; 81 L. J. (Ch.) 759. *Teasdale's Case*, (1873) L. R. 8 Ch. 54 and *Eichbaum v. City of Chicago Grain Elevators*, (1891) 3 Ch. 459 followed.

was actuated by malice in ruling against him. In such cases, the mere deprivation of a man's legal right does not entitle him to damages.

Whether a certain person was or was not a qualified director, whether or not a certain person was qualified to be chairman of a general meeting, and whether certain persons were or were not duly elected as directors of a company, are matters which relate exclusively to the internal management of a company's affairs. With such matters the court declines to deal at the instance of any person other than the company itself, unless there be something illegal, oppressive, fraudulent *ultra vires*, on the part of the company *qua* company, or on the part of the majority of the company, so that they were not fit persons to determine it. People ought as far as possible to be allowed to manage their own affairs without interference by a court of law (b).

Management of
internal affairs.

The director of a company who acts *ultra vires*, but honestly and reasonably, and on the advice of counsel which is erroneous, is within the terms of section 279 of the Companies (Consolidation) Act, 1908, and the court may, if it comes to the conclusion that he ought fairly to be excused for the breach of trust, relieve him from liability either wholly or in part (c).

Although a director of a public company is always clothed with a fiduciary character in regard to the dealings of any property of the company in his capacity of director, the rule that a trustee is not allowed to make a profit of his trust does not apply to such a director *qua* director only (d). A director of a company, though he may occupy a fiduciary position with regard to the share-holders collectively, holds no such position with regard to the individual share-holders. So an action will not lie to recover damages in relation to certain shares

Fiduciary position.

in a company, on the ground that the defendant, a director of the company, knowing the shares to be worthless, made false representations as to their nature and thus induced the plaintiff to purchase the same (e). Misrepresentation by the director of a Bank to an intending applicant for purchase of shares will not bind the Bank, or enable the purchaser afterwards to repudiate the contract with the Bank (f). When the plaintiff Bank sued the defendant company for recovery of a certain sum due in respect of money advanced by the Bank to the company, for future interest and for a lien on all the raw materials and manufactured goods of the company until satisfaction, and it was contended on behalf of the defendant that the borrowing by the directors from the Bank was in excess of their powers was impliedly ratified and sanctioned by the share-holders at general meetings. The passing of accounts and declaration of dividends constituted sanction

(b) *Ramnarain v. Ramkishan*, 46 P. R. 1911=10 I. C. 515.

(c) *In re Claridge's Patent Asphalt Co.*, (1921), 1 Ch. 543; *In re Allsop Whittaker v. Bamford*, (1914) 1 Ch. 1 applied.

(d) *In re Port Canning Land Investment & Co.*, 6 B. L. R. 278.

(e) *Wilson v. Macanliffe*, 18 All. 56.

(f) *Provincial Bank of India v. Rai Raja Tej Singh*, 127 P. R. 1889.

and ratification of the borrowing in excess (g). The directors are personally responsible for any loss the company may sustain by reason of acts done by them, not warranted by memorandum of association (h), and the company does not incur any liability in respect of such acts (i).

By the article of association of the defendant company the Board of Directors were empowered to "appoint from time to time any one or more of their number to be managing director or managing directors on such terms as to remuneration....and with such powers and authorities, and for such period as they deem fit, and may revoke such appointment." In 1908 the directors appointed the plaintiff as a managing director and agreed that he should hold the office as long as he should remain a director of the company and retain his due qualification and should efficiently perform the duties of the office. The plaintiff continued to comply with those requirements, but in 1912 his appointment as managing director was revoked. In respect of this termination of his agreement the plaintiff claimed damages for wrongful dismissal and the jury found a verdict in his favour. It was held that the agreement for the appointment of the plaintiff as managing director, although containing no power to revoke the appointment, was *intra vires* the directors, and that the plaintiff was, therefore, entitled to recover damages in respect of his wrongful dismissal (j).

A share-holder in a limited company, carrying on the business of timber merchants, brought an action of declaration and interdict against the company, in which he averred that the balance sheet issued by the directors and passed by a general meeting was false and *ultra vires* in this respect that the stock of timber was entered therein at less than its true market value, whereby a part of the profits earned by the company was concealed from the share-holders, but he made no averment of fraud on the part of the directors. It was held that the valuation of the stock of timber was an administrative matter within the discretion of the directors in connection with which they were answerable only to the general body of share-holders of the company; that there were no relevant averments of *ultra vires* acting on the part of the company or the directors; and the action was dismissed (k).

When the appointment of a *Mustaddi* by the managing agent of a company was never submitted to the meeting of the share-holders of the company, the mere fact that the person appointed was allowed to work as *mustaddi* for some time could not be held to be ratification or acquiescence in such appointment by the company (l).

Section 61, Indian Companies Act (VI of 1882) (corresponding with

(g) 106 P. L. R. 1902.

(h) *Kathiawar Trading Co. v. Virchand*, 18 Bom. 119.

(i) *In re Port Canning Land Investment & Co.*, 7 B. L. R. 583.

(j) *Nelson v. James Nelson & Sons, Ltd.*, (1913) (2 K. B. 471-82 L. J.) K. B. 827.
Bluett v. Stutchburys, Ltd., (1908) 24 T. L. R. 469 distinguished.

(k) *Young v. Brawnlee & Co.*, (1911) S. C. 677.

(l) *Ramchand v. Diamond Jubilee Flour Mills Co. Ltd.*, 10 P. R. 1905.

section 38 of the English Companies' Act of 1862) creates a new liability in the share-holders, and that liability includes contribution not only in respect of calls made since the winding up, but also, in respect of unpaid calls made before the date of the winding up, whether barred by limitation at that date or not. Directors have no power to cancel shares duly issued to a share-holder at his request and so reduce the capital of the company (m). There is nothing to prevent the directors of a company from entering into a contract with company for their own benefit (n). Once the rights of parties dealing with a registered company have become fixed by a contract, the company cannot by a special resolution subsequently passed by it alter those rights (o).

By an agreement made between the defendant company and the plaintiff, the latter was appointed sole manager, for a terms, of the company's confectionery department and of extensions of it. He was to have full power to conduct in a reasonable manner the practical and commercial business of the department without in any way being interfered with by the directors, except as regards the expenditure of additional capital on new branches, the erection of additional buildings or machinery or the conduct of legal matters. The plaintiff now sought to restrain the company from alleged wrongful and unwarrantable interference with the conduct of the business of his department. It was held that the agreement was *ultra vires* of the articles of association of the company and of the directors, and could not be enforced (p). So when the promoters of a company for working mines contract that the company when formed, shall purchase certain mineral property, without taking precautions to ascertain the value of such property and stipulate that the vendor shall give them a bonus out of the purchase money, the contract is in excess of powers and in breach of trust and cannot be specifically enforced. Where an agreement, entered into with the managing agents of a company is unreasonable and such as should not be entertained in the usual way and according to the ordinary course of business it is *ultra vires* and the company is entitled to repudiate it (q).

A harbour improvement company were authorised by their private Act to establish a fish market. All fish (with some immaterial exceptions) which was landed at the port had, under a penalty, to be sold in the market. The company had power under section 49 of their Act, to make bye-laws for "the regulations and government of the fish market and of the quay on which the same is established," and penalties were imposed on persons offending against any bye-law. One of the bye-laws made provided that "no person shall gut or cleanse any fish in the market except by the leave of the wharf-master and in such place

Case of a Fish Market.

(m) *Sorabji Famsetji v. Ishwardas Jugliwandas Store and another*, 20 Bom. 654.

(n) 10 P. R. 1905.

(o) *Conjeeveram Hodgsonpet Nidhi v. Kandaswamy*, 28 I. C. 847, following *Allen v. Gold Reefs of West Africa, Ltd.*, (1900) 1 Ch. D. 653.

(p) *Horn v. Henry Faulder & Co., Ltd.*, 99 L. T. 524.

(q) *Ramchand v. Diamond Jubilee Flour Mills Co., Ltd.*, 10 P. R. 1905.

(if any) as may from time to time be appointed by the wharf-master for that purpose." An order was made by the wharf-master that, "owing to the impossibility of getting rid of the offal, no dog-fish, ray or skate are to be gutted in the Fish Market." No adequate place for gutting dog-fish was to be found in the town except the Fish Market. The fish were bought in the market mainly for sending away by rail and dog-fish must be gutted as soon, after they are landed, as possible, as they largely consist of offal, and quickly decompose. A buyer of dog-fish, the respondent gutted them in the market without obtaining leave from the wharf-master. An information against him was dismissed on the ground that the bye-law was unreasonable, and therefore bad, as it would be impracticable to carry on the industry if buyers were prohibited from gutting fish in the market. It was held, that as the effect of the bye-law was to prevent the landing of the dog-fish, or the sale of it in the Fish Market, it must be sold according to the Act, without the leave of the wharf-master, the bye-law was unreasonable and bad in law (r).

A company incorporated by private Act of Parliament was own a fish market, where all fish landed in the district for sale had to be sold. Under their statutory powers of making bye-laws for the regulation of the market and preventing nuisances therein the company passed a bye-law prohibiting the gutting of dog-fish in the market. Dog-fish contain an unusual amount of offal, and have to be gutted very soon after landing; and the company had found great difficulty in getting rid of the offal, which was a nuisance. The prohibition would have the effect of altering the conditions of the dog-fish industry, and of restricting the sale of the fish, but would not put an end to it. It was held that the bye-law, in the circumstances, was reasonable, and therefore valid (s).

(r) *Sutton Harbour Improvement Co. v. Foster*. 89 L. J. (K. B.) 829.

(s) *Sutton Harbour Improvement Co. v. Foster* (No. 2) 89 L. J. (Ch.) 540; 123 L. T. 549.

COMPANIES—II

Among commercial companies for which the Indian legislature had specially provided were the railway companies and the Presidency Banks. The Indian Railways Act (IX of 1890) consolidated the law relating to railways in India. That Act lays down the limits of the powers exercisable by railway administrations in the matter of transport of goods and passengers and of construction and repair of the permanent ways or other works connected therewith. Several of the provisions of the Act of 1890 have since been amended and in the matter of its responsibility in carrying goods the Railway is no longer a bailee but is an insurer. There is a proposal at the present moment to make further extensive amendments which might culminate in bringing out a completely new Act. There is, however, a great importance especially for those who are following these lectures, to have a picture of the Act as it is and how it has worked.

Indian Railways.

A railway administration may....

(a) make or construct in, upon, across, under or over any lands, or any streets, hills, valleys, roads, railways or tram-ways, or any rivers, cannals, brooks, streams or other waters, or any drains, water-pipes, gas-pipes

Authority to execute all necessary works.

or telegraph lines such temporary or permanent inclined planes, arches, tunnels, culverts, embankments, aqueducts, bridges, roads, lines, or railway, ways, passage conduits, drains, piers, cuttings and fences as the railway administration thinks proper;

(b) alter the course of any rivers, brooks, streams or water-courses, for the purpose of constructing and maintaining tunnels bridges, passages or other works over or under them, and divert or alter, as well temporarily as permanently, the course of any rivers, brooks, streams, or water-courses or any roads, streets or ways, or raise or sink the level thereof, in order the more conveniently to carry them over or under or by the side of the railway, as the railway administration thinks proper;

(c) make drains or conduits into, through or under any lands adjoining the railway, for the purpose of conveying water from or to the railway;

(d) effect and construct such houses, warehouses, offices and other buildings and such yards, stations, wharves, engines, machinery, apparatus and other works and conveniences as the railway administration think proper,

- (e) alter, repair or discontinue such buildings, works and conveniences as aforesaid or any of them, and substitute others in their stead; and
- (f) do all other acts necessary for making, maintaining, altering or repairing and using the railway (a).

The directors of a railway company had no power at their own hand to dismantle the whole undertaking and convert the plant into money. The directors of a railway company having proposed to dismantle the line and to sell the plant, objection was taken by, inter alia, one of the shareholders (who was also a debenture-holder) on the ground that the proposal was *ultra vires* and illegal. It was held that the directors had no power to dismantle the line, and interdict granted as craved (b).

No conversion
or diversion

Section 1 of the Great Northern and Manchester, Sheffield, and Lincolnshire Railway Companies Act, 1858, does not authorise the making by the two companies of an agreement for pooling all their income and receipts, for an agreement for joint-working of both the lines as distinct from a working of both the lines by one only of the two companies. Therefore an agreement intended to effect these objects is *ultra vires* (c).

A railway company agreed to supply a hotel with a good and adequate supply of water fit for drinking purposes as far as was practicable from the springs in their tunnel. The water was liable to be contaminated, and the plaintiff brought his action insisting that he was entitled to a proper supply of drinking water. It was held that the railway company had carried out their contract, which was simply to supply surface water, which would otherwise run to waste, and that an agreement to supply drinking water, and lay pipes and mains for all time would be *ultra vires* (d).

The G. I. P. Ry. Co, while constructing a branch railway known as the Harbour Branch Railway, laid their lines across a public street, which was vested in the Municipal Corporation of Bombay, without their permission and without acquiring the road. The municipal corporation sued the railway company to obtain a declaration that the defendant company were not entitled to take possession of the public street, where they had laid their permanent lines of railway without having previously obtained the permission of the Corporation and without having acquired the land under Land Acquisition Act. It was held, on appeal, that under this section (Sec. 7 of the Railways Act) the Railway Company was entitled to lay the line without the permission of the plaintiffs and that there was no necessity to acquire the road, which was already passing across the street (e).

Lands acquired by a railway company must be used for the purposes of

(a) Act IX of 1890, sec. 7.

(b) *Ellice and others v. Invergarry and Fort Augustus Ry. Co.*, (1913) S. C. 849; Sub nom. *Locharbar District Committee of Inverness-shire County Council v. Invergarry and Fort Augustus Ry. Co.*, 50 S. C. L. R. 550.

(c) *In re Great Northern Ry. Co., and the Great Central Ry Co.* 24 T. L. R. 417.

(d) *Wilson v. Great Western Ry. Co.* 128 L. T. Jo. 340.

(e) *G. I. P. Ry. Co. v. Municipal Corporation of Bombay*, 38 Bom. 565.

the Act only, and if they use them for other purposes they can be restrained by injunction (f).

In a suit against a railway company for compensation for damages caused to the plaintiffs' lands adjacent to the railway line by negligently allowing rain water to be flooded in the making of a railway, by constructing borrow pits, in such a way as to be contiguous, they acting as channels for water to pass along the line, it was held that as the defendants had exceeded the powers conferred upon them, they were liable for negligence and the suit was maintainable (g).

A railway administration may, for the purpose of exercising the powers conferred upon it by this Act, alter the position of any pipe for the supply of gas, water or compressed air or the position of any electric wire, or of any drain not being a main drain:

Alteration of pipes,
wires and drains.

Provided that:

- (a) when the railway administration desires to alter the position of any such pipe, wire or drain it shall give reasonable notice of its intention to do so, and of the time at which it will begin to do so, to the local authority or company having control over the pipe, wire or drain or when the pipe, wire or drain is not under the control of a local authority or company, to the person under whose control the pipe, wire or drain is;
- (b) a local authority, company or person receiving notice under the proviso may send a person to superintend the work, and the railway administration shall execute the work to the reasonable satisfaction of the person so sent and shall make arrangements for continuing during the execution of the work supply of gas, water, compressed air or electricity or the maintainance of the drainage, as the case may be (h).

But the powers given under sections 7 and 8 cannot be exercised on lands and buildings vested in the Central or State Government without the consent of the government concerned. (Sec. 8A).

In a suit by the Municipal Corporation of Bombay against the G. I. P. Ry. Co., to declare that the plaintiffs were entitled to enter upon the lands of the defendant company to make connections between the mains and to lay pipes for this purpose without their permission, it was held that the plaintiff had the right to enter on such lands for the said purpose, that the connections were not either further accommodation works or accomodation works at all and that this section (Sec. 12) does not in any way take away the right of the municipality to enter upon the lands of the defendant company to make the proposed connections (i).

(f) *Bostock v. North Staffordshire Ry. Co.*, 3 Sm. & Giff 283; *Norton v. L. & N. W. Ry. Co.*, 9 Ch. D. 623.

(g) *Gaekwar of Baroda v. Gandhi Kachraabhai*, I. L. R. 27 Bom. 344.

(h) Act IX of 1890, Sec. 8.

(i) *G. I. P. Ry. Co., v. Municipal Corporation of Bombay*, 23 Bom. 358.

The Indian Railways Act, 1890 is divided into several Chapters. While Chapter III relates to construction and maintenance of works, Chapter IV deals with matters relating to opening of a railway. Sanction of the Central Government is a condition precedent to the opening of a railway and the Central Government may, under certain circumstances, order the closing down of an opened railway or to re-open a closed Railway. Chapter V relates to Traffic facilities and it opens with Sec. 26 which lays down, very specifically, that except as provided in the Act, no suit shall be instituted or proceeding taken for anything done or any omission made by a railway administration in violation or contravention of any provisions of this Chapter. Traffic includes conveyance of animals and goods and rolling stock besides passengers. Provisions relating to working of Railways will be found in Chapter VI. The most important subject as to the responsibility of Railway administration as carriers is dealt with in Chapter VII of the Act. There

Indian Railways
Act, 1890

has been extensive amendments to the different Sections covered by this Chapter. As carriers of goods the Railways are no longer considered to be bailees within the ambit of Sections 151, 152 and 161 of the Indian Contract Act, 1872. By an amendment in 1961 the responsibility of the Railways at present is that of a common carrier. Sec. 82-A to 82-J speak of the liability of a railway administration in respect of accidents to trains carrying passengers and payment of compensation and matters allied thereto. In no case, however, the amount of compensation shall exceed Rs. 50,000/- and the liability in that respect is decided by Claims Commissioners appointed by the Central Government under Sec. 82-B. Chapter VIII relates to accidents and Chapter IX as to penalties and offences. Certain supplemental provisions including the rules which will regulate the levy of taxes in respect of railways and from railway administrations in aid of the funds of local authorities are contained in Chapter X.

It will be of interest to note some of the very interesting cases that came up before the Courts in the working of the Statute.

In *Laljibhai Shamji and others v. G. I. P. Railway Company (j)* the plaintiffs sued to recover from the defendants the sum of Rs. 1,34,152-11, which during the three years prior to suit the plaintiffs had been obliged by the defendants to pay as "terminal charges" on consignments of cotton made by the plaintiffs from up-country stations to Bombay.

By the Act of Incorporation of the defendant company it was enacted that it should be lawful for the railway company and the East India Company to enter into such contracts, &c., as they thought fit, (*inter alia*) "for performing all matters and things necessary or convenient for carrying into effect the making, maintaining and working the railway including any provision as to tolls, receipts and profits thereof." Subsequently the defendant company and the East India Company entered into an agreement with each other, under which the defendant company was empowered to make certain charges called "terminal charges" charges which are levied on account of the carrying

(j) I. L. R. 15 Bom. 537; on appeal I. L. R. 16 Bom. 434.

of goods to and from the wagons, loading and unloading them on and from the wagons, and for the use of the company's premises till the goods are removed. The plaintiffs objected to these charges as not being within the scope of the powers conferred by the Act of Incorporation of the defendant company. It was held, that these charges were within the authority given by that Act, and that such charges, if not strictly "tolls", were certainly charges for performing of services, if not "necessary," at any rate "convenient for the working of the railways".

In a suit against a railway company for the recovery of six pies paid by a person under protest for the purchase of a platform ticket to enable him to enter on the railway platform to see his friend off by a mail train, the Small Causes Court which tried the case decreed for the plaintiff. On the application of the defendant company to the Chief Court to revise the order of the Small Causes Court, it was held (1) that the railway company were justified in excluding from the station platform the respondent without a platform ticket; (2) that a railway administration, under one of the rules framed by the Government of India (rule 29) for the guidance of railway officials and the public, has the right to exclude from the railway station any person not having business on the railway premises; and (3) that the desire of a person to see his friend off would not constitute business within the term of the rule (k).

In a suit against a railway company for refund of wharfage alleged to have been illegally levied by the defendant company for delay in taking delivery of the first portion of a consignment, which arrived at the destination in parts on different dates, it was held that the plaintiff's contention that the wharfage charge was illegal must succeed inasmuch as the rules relied on by the company were not published in the *Gazette of India*. It was held also, that the general rules made by the Governor-General in Council, and published in the *Gazette of India* by notification do not become operative as the rules of any individual railway company merely upon their adoption by the company. It must be shown that the particular railway company made rules, that those rules, received the sanction of the Governor-General in Council and have been published in the manner prescribed by the Act (l).

The plaintiff did not remove from the railway premises goods delivered on payment of freight and other charges legally payable and the delay was due to a dispute between the parties, the plaintiff insisting on the weighment of goods and the defendant company objecting to it. The plaintiff brought a suit against the defendant company for refund of wharfage charges alleged to have been illegally realized from him on the ground that the rules on which the defendant company relied were not made and published in the manner prescribed by Sec. 47 of the Act. It was held, that the rules were not made as contemplated by the Act and a decree was passed in favour of the plaintiff.

(k) *E. I. Ry. Co., v. Lala Moti Sagar*, 116 P. L. R. 1911.

(l) *Hari Lal Sinha v. B. N. Ry. Co.* 15 C. W. N. 195.

It was held that rules adopted by a railway company though not originally prepared by it would satisfy the requirement of Sec. 47 of the Railway Act, if they were subsequently sanctioned by the Governor-General in Council and published in the *Gazette of India* (m).

The plaintiff purchased a season ticket entitling him to travel on the defendant company's line of railway between two specified stations from the 1st May to the 31st July 1902; on or about, the 18th May 1902 he lost the season ticket and requested the defendant company to issue to him a duplicate season ticket which it declined to do on the ground that the rules contained in their Quarterly Time Table and Railway Guide did not admit of duplicate season tickets being issued

Season ticket case.

and they also declined to make any refund or to return the deposit made on the issue of the season ticket. The plaintiff filed a suit against the defendant company to recover the sum of Rs. 15 being the amount paid for the season ticket, including the deposit, and in the alternative, the plaintiff sought to recover that sum as damages. It was held (1) that the rule of railway company published in their Quarterly Time Table and Railway Guide as required by Sec. 47(1) was not *ultra vires* for want of sanction of the Governor-General in Council; (2) that under this rule the company were not bound to issue a duplicate season ticket or to refund the deposit amount (n).

The plaintiff handed over goods to a railway company for despatch to another place, which was accordingly done. He however, failed to take

Receipt against delivery to Railway.

a receipt for the goods despatched which never reached their destination and in a suit for damages, the company pleaded that under a rule framed under Sec. 47(1) (1) "delivery" will be deemed to be complete only on a receipt in the proper form being granted by the company's authorised servants, and that as the rule had not been complied with in the case, they were not liable. It was held, overruling this plea, that goods had been 'delivered' to the railway authority within the meaning of Sec. 72 and the company could not escape liability for their negligence.

Per Piggott, J.—It is not open to a railway company to enact, by means of rule, that although as a matter of fact goods have been delivered to a duly authorised servant of the administration to be carried by the railway, nevertheless the court shall not deem them to have been so delivered unless and until the railway servant in question has performed a particular act, such as granting a receipt.

Per Walsh, J.—No rule which any company can make can cut down, control or limit its liability which is a creature of Statute under S. 72; and if a rule is relied upon by the company which is inconsistent with that liability, it has clearly gone beyond the authority created for making rules (o)

(m) *B. N. Ry. Co., v. Ramprotab Gansham Doss*, 16 C. W. N. 360.

(n) *Byramjee v. B. B. & C. I. Ry. Co.*, Civil Application No. 161 of 1903 in the High Court of Judicature at Bombay.

(o) *Firm Sohanpal Munna Lal v. The East Indian Railway*, 44 All. 218.

A firm of fire-brick manufacturers, who owned a private railway siding in their works, made use of the locomotives, wagons, and servants of the railway company, when moving materials from one part of the works to another. The Railway Company having intimated an increase in its charges for these services, the manufacturers objected to the increase as unreasonable, but continued to accept the services and to make payments at the old rates, which the company accepted as payments on account. In an action by the railway company for a sum representing the difference between the accounts rendered and the amounts paid, the defendants maintained that the jurisdiction of the court was excluded in respect of the questions of the legality of the increased charges which fell to be determined either by an arbitrator appointed by the Board of Trade in terms of the Railway Rates and Charges, [No. 19 (Caledonian Railway, &c.), Order Confirmation Act, 1892, Schedule of maximum Rates and Charges (5)], or, alternatively, by the Railway and Canal Commissioners in terms of the Railway and Canal Traffic Act, 1894, S. 1. sub-sec. 3. It was held that the statutory provisions founded upon were inapplicable in this respect and that the services were not incidental to the conveyance of goods on the railway, but were connected solely with the internal traffic of the brickworks; and accordingly held that the jurisdiction of the court was not excluded; also that the services were not *ultra vires* of the railway company, and (2) that the defendants having continued to accept the services after intimation of the increase in the charges, could not object to the increase (p).

All major Railways in the Country are now under Government management and a few narrow gauge Railways which were being managed by private companies were taken over by the Government by the Railway Companies (Emergency Provision) Act, 1951. Within 10 years of the passing of the Railways Act, 1890, the Indian Railway Board Act, 1905 was passed. The Act has continued to remain in the Statute book since then as the Federal Railway Authority provided for in the Government of India Act, 1935 never came into existence. By necessary amendment the Railway Board Act, 1905 has been adopted to the present set up. The object of the Railway Board Act is to provide the Board with the powers and functions of the Central Government under the Indian Railways Act of 1890 and with the powers to make general rules as to Government Railways. Railway is a subject in list I of the Schedule VII of the Constitution.

Now let us have a look at the development of the Banking Companies in our country.

The Presidency Banks Act (XI of 1876) constituted the Bank of Bengal, the Bank of Bombay and the Bank of Madras, by remodelling and amending the provisions relating to Banks of similar names till then existing as ordinary joint-stock com-

(p) *Caledonian Railway v. Stein & Co.* (1919) S. C. 329.

panies. These Banks were declared bodies corporate with perpetual succession under those names and would respectively possess and enjoy all the rights, powers and immunities incidental to a corporate aggregate, shall use a corporate seal and shall sue and be sued by the corporate name. It provided that the proprietors and share-holders, for the time being, shall be members respectively of the bodies corporate.

The business of the Bank was to be managed by the Board, which shall in the first instance consist of six directors, and may subsequently consist of such number, not less than six, and not more than nine, as may be fixed by a special resolution. Such directors shall be selected by vote at a general or special meeting. Three of the directors shall form a quorum for the transaction of business. The directors shall choose a president and vice-president from among themselves at their first meeting in every year. The decision of the majority will be the decision of the board and the chairman has a casting vote in case of an equal division of vote^(q). The Bank was authorised to carry on and transact the several kinds of business as provided in the Act which also provided certain restriction in respect of those transactions.

By the Imperial Bank of India Act (XLVII of 1920) the Presidency Banks were dissolved and amalgamated into the Imperial Bank of India, of which the Presidency Banks were designated as branches. The Imperial Bank was constituted a body corporate, with power to hold, acquire, dispose of property, open closed branches and enter into contracts. The business was managed by a Central Board of Governors, with Local Boards in all branch stations, which had power to make bye-laws. The schedules specified the nature of business which the Bank could and could not transact. The annexures to the Act prescribed the procedure and routine of business.

In 1934 the Central Legislature passed the Reserve Bank of India Act, 1934 which became effective from 6th March of that year. The object of the Act is to constitute a Reserve Bank of India and the Preamble to the Statute says that whereas it was expedient to constitute a Reserve Bank of India to regulate the issue of Bank notes and the keeping of reserves with a view to securing monetary stability in India and generally to operate the currency and credit system of the country to its advantage and whereas though due to the disorganisation of the money system of the world at that time it was not possible to determine what would be suitable as a permanent basis for the Indian monetary system, yet it was felt expedient to make temporary provision on the basis of the then existing monetary system, and to leave the question of the money standard best suited to India to be considered when the international money position became sufficiently clear and stable to make it possible to frame permanent measure, the Act was passed. The Act has come to stay though several of its provisions have been amended from time to time.

(q) Act XI of 1876, sec. 24 &c.

A Schedule of Banks is appended to the Act and under Section 42 every such Bank is to maintain with the Reserve Bank of India an average daily balance the amount of which would not be less than certain percentage of the total of the demand and time liabilities. Thereafter in 1949 The Central Legislature also passed the Banking Regulation Act 1949 some of the main features of which are,

- (a) A comprehensive definition of 'banking' so as to bring within the scope of the Legislation all institutions which receive deposits repayable on demand or otherwise for lending or investment;
- (b) Prohibiting non-banking companies from accepting deposits repayable on demand;
- (c) Prescription of a special form of balance-sheet and conferring of powers on the Reserve Bank of India to call for periodical returns;
- (d) Inspection of the books and accounts of a Bank by the Reserve Bank of India;
- (e) Empowering the Central Government to take action against Bank conducting their affairs in a manner detrimental to the interests of the depositors;
- (f) Bringing the Imperial Bank of India within the purview of some of the provisions of the Act;
- (g) Widening the powers of the Reserve Bank of India so as to enable it to come to the aid of banking companies in times of emergency.

By an amendment in 1978 the Reserve Bank of India has been empowered to (a) open gold accounts abroad with principal currency authorities of foreign countries (b) open such accounts with the Bank of International Settlement (c) invest in foreign securities (d) open accounts with foreign branches of Banks of our Country (e) invest in shares and securities of International Banks and (f) give loans to Scheduled banks in foreign currencies.

The position of the Reserve Bank being such the next relevant topic would be its powers under the Banking Companies Act. The Banking Companies Act, 1949 is the product of many legislative enactments. The Banks' Liquidation Proceedings Act.

Committee (1952) correctly described it as "made up of shreds and patches." To quote Hidayatullah J. In the Indian Companies Act, 1913, there was no special procedure for banking companies, particularly relating to their winding up. Special provisions were introduced in that Act by the Indian Companies (Amendment) Act, 1936. Part X-A which was then introduced merely enacted certain regulatory provisions, but of winding up of banking companies, it said nothing. The amendment hardly met the purpose, and the Reserve Bank of India framed a draft bill as far back as 1939 from which has been fashioned the present Banking Companies Act.

During the War years, the India Companies Act was amended several times to meet some special exigencies. But by July, 1946, it was realised that certain undesirable features in banking had come to exist. Banks were

then getting control of non-banking companies, and by the inter-locking of shares, the banking companies were able to manipulate the finance at their disposal. The main features were "the grant of loans to persons connected with the management of banks without adequate security, extensive window-dressing at the time of preparing balance-sheet, and in general, a tendency to utilise the banks' funds to the detriment of the interests of the depositors." It must not be forgotten that the Indian Companies Act, 1913 was concerned primarily with safeguarding the interests of the stockholders, whereas in a banking company, the interests of the depositors are invariably many times those of the stockholders, if those interests can be said to be represented by the monies invested respectively. In 1946 an Ordinance was promulgated consisting of only six sections, of which the operative sections were the last four. Section 3 enabled the Central Government to direct the Reserve Bank to cause an inspection to be made of any banking company and its books and accounts and to make a report to the Central Government. Sec 4 provided the machinery and the procedure to implement Sec. 3. Section 5 empowered Government to prohibit a bank from receiving fresh deposit or to direct the Reserve Bank not to include a particular bank in the Second Schedule, or to exclude it, if already included. Sub. Sec. (2) provided for certain penalties, and Sec. 6 authorised the Central Government to publish, after reasonable notice to the banking company concerned, any report or parts thereof. This was an attempt to ensure the depositors a certain measure of safety in regard to their money.

Safeguarding interest
of depositors

The Ordinance was followed by the Banking Companies (Restriction of Branches) Act, 1946, which, as its name shows, put a curb on the indiscriminate opening of branches by some banks. The evils of indiscriminate advances and loans were then sought to be met by an Ordinance promulgated in 1948. "The Banking Companies Control Ordinance" (XXV of 1948). In that Ordinance, it was provided that the Court shall appoint

Disquieting picture

the Reserve Bank as the Official Liquidator of a banking company on the application of the Reserve Bank in that behalf. The Reserve Bank of India Act was also amended to enable the Reserve Bank to give a loan or loans to a banking company with a first charge on the assets, if wound up. A large number of banking companies had failed during the years, 1947, 1948, and 1949. Between 1926 and 1937, 23 Banks had suspended payment. In 1938 and 1939, 46 Banks failed, from 1940 to 1946, 95 Banks were involved. But in 1947, 1948 and 1949 there were as many as 123 failures involving outside liabilities of Rs. 82 crores: The largest number was in Calcutta with 83 Banks. In the winding up proceedings that followed, many unsatisfactory features were noticed. It was noticed that the realisations were insignificant, while the costs were great, and enormous expenditure of time took place. The winding up of any company, be it a banking company or any other, requires an investigation of the affairs, the recovery and realisations of assets and distribution of what is realised. While those matters can of course, be

carried on without undue hurry, the decision whether there should be a winding up or not, cannot be unduly deferred in the case of banking company, if the interests of the depositors are to be safeguarded. To achieve solidarity in banking operations and also to preserve the rights of the depositors while a bank continues and more so when it cannot, the Banking Companies Act was the logical, and indeed, the only answer.

We have seen that the Reserve Bank was already functioning as a central bank with a certain measure of control over the other banks, scheduled or unscheduled. This control was tightened in the Banking Companies Act by making provisions which were intended to protect the interests of the depositors. Differences noticeable between the Banking Companies Act, on the one hand and the Companies Act, on the other, which have been characterised as discriminatory, are thus explainable on the basis of the object to be achieved. The Banking Companies cannot be compared with other companies.

Reserve Bank to see that the depositors' money is safe.

The ordinary companies deal with the money of the stock-holders, who own a share in the assets, who appoint their own Directors, for better or for worse, and whose liability is also limited. The banking companies are in an entirely different class, as they deal with the money of the depositors, who have no security except the solvency of the banking companies and so must be regulated somewhat differently, and the interests of the depositors must be paramount and the winding up of such companies depends upon other considerations, chief among which is the desire to pay off the creditors as far as possible in full or at least equitably. The action is thus dictated not from any abstract consideration of a long-range view of the further ability of a bank to pay its creditors but its ability to pay them at any given time. In this connection, the Reserve Bank has been given by the Banking Companies Act the power and has been invested with the duty of watching the affairs of every banking company with a view to ensuring the safety of the depositors' money. There is thus, at the very start, a reasonable classification, which is also a very just and practical classification, to achieve the avowed purpose.

It is hardly necessary in these lectures to examine each and every provision of the Banking Companies Act. "When the Banking Companies Act was originally enacted, the main objects were to prescribe minimum capital standards, to prohibit the non-banking companies to accept deposits repayable on demand and to limit dividends payable. But included in the Act was a comprehensive scheme for licensing of banks and a conferral on the Reserve Bank of the power to call for periodical returns and balance sheets and to inspect books and accounts of banking companies. The Act also empowered the Central Government to take action against banks conducting their affairs in a manner detrimental to the interests of the depositors and provided for a quicker procedure for winding up banking companies.

When the Banking Companies Act was passed in 1949, it was explained in the note on clause 37 which corresponded to section 38 that the provisions

of the Indian Companies Act in respect of liquidation of companies did not seem to be suitable for banking companies, that a bank's business being of an over-the-counter kind, the bank has to meet immediately its liability and a provision for winding up of the banking company when it refuses to meet a lawful demand within a stated time, was necessary. It was also stated that the Reserve Bank was given authority to apply for the liquidation of a banking company if its affairs were conducted to the detriment of the interests

Wide powers of the Reserve Bank.

of the depositors. An examination of the Banking Companies Act thus reveals two things prominently.

The first is that the whole intent and purpose of that Act is to secure the interests of the depositors. The second is that the Reserve Bank is the instrumentality by which this intent is to be achieved. The Act, at every turn, makes the Reserve Bank the authority to sanction, permit, certify, inspect, report, advise, control, direct, license and prohibit. There is hardly a provision where the Reserve Bank's judgment is not made final vis-a-vis a banking company except where an appeal to the Central Government can lie. No useful purpose will be served in referring to these sections in detail.

Nor do the powers of the Reserve Bank end there. The Reserve Bank not only has powers over banking companies while they are functioning, but it has also powers when the banking companies wish, or are forced, to cease to function. If a banking company wants to suspend its business and applies to the High Court for a moratorium, the application is not maintainable, unless it is accompanied by a report of the Reserve Bank indicating that in the opinion of the Reserve Bank the banking company will be able to pay its debts. When the High Court grants the relief without

Moratorium and the interest of the depositors.

such report, it has to call for a report from the Reserve Bank. The High Court is also required to have regard to the interests of the depositors, and even

during the period of moratorium granted by the High Court, the Reserve Bank can apply for the winding up of the banking company, and secs. 39 and 41-A give special powers to the Reserve Bank in winding up proceedings. Even in voluntary winding up of a banking company, the Reserve Bank has to certify that the banking company is able to pay in full all its debts to its creditors, as they accrue. In amalgamation of banking companies, the scheme has to be approved by the Reserve Bank. Similarly, in compromises or arrangements between the banking company and its creditors, the Reserve Bank has to be satisfied. In all these matters, the satisfaction, inter alia, must be as to the interests of the depositors. In reconstruction of a banking company after an application by the Reserve Bank for an order of moratorium, the Reserve Bank has to satisfy itself and prepare a scheme, which, inter alia, must be in the interests of the depositors. The court is wholly unsuited to gauge the seriousness of the situation, for it cannot be in possession of materials which are available only to the executive Government. Quick decision and swift and effective action must be of the essence of these powers and the exercise of it must, therefore, be left to the subjective

satisfaction of the Government. To make the exercise of these powers justiciable and subject to the judicial scrutiny will defeat the very purpose of the enactment.

These observations lay down clearly that there may be occasions and situations in which the legislature may, with reason, think that the determination of an issue may be left to an expert executive like the Reserve Bank rather than the Courts without incurring the penalty of having the law declared void. The Law thus made is justified on the ground of expediency arising from the respective opportunities for action. Of course, the exclusion of Courts is not lightly to be inferred nor lightly to be conceded. The reasonableness of such a law in the total circumstances will, if challenged, have to be made out to the ultimate satisfaction of the Court, and it is only when the Court considers that it is reasonable in the individual circumstances that the law will be upheld (r).

We may now proceed to the other important banking institution.

The State Bank of India was created by a Statute. The State Bank and its subsidiaries are therefore statutory corporations. In 1951 the Reserve Bank of India appointed a Committee which submitted a report. One of the important recommendations, and an integral part of the solution of the rural credit problem, propounded by the Committee was the setting up of the State Bank of India as one strong integrated State-partnered commercial banking institution with an effective machinery of branches spread over the whole country for stimulating banking developments by providing vastly extended remittance facilities for co-operative and other Banks and following a policy which would be in effective consonance with national policies adopted by Government without departing from the canons of sound business. Such a State Bank of India was envisaged as coming into being by the amalgamation of the Imperial Bank of India with certain State associated Banks. The entire Imperial Bank of India was therefore taken over with a view to effect more centralised control over the rural credit and to facilitate large remittance facilities, as also to implement financial policies of the Government of India without losing sight of the sound commercial principles. It may be noted that 14 major Banks of this country were nationalised with a view to control the financial heights. The corporate bodies viz., the Banks, therefore, are the agencies of the Government, which have a large hand in controlling the policies. In making several appointments forming the structure of these Corporate bodies like the Life Insurance Corporation, the Industrial Finance Corporation, the Oil and Natural Gas Commission and the State Bank of India the Government's role is quite clear. Even in laying down policy involving public interest, the State Bank shall be guided by the directions given by the Central Government in consultation with the Governor of the Reserve Bank of India and the Chairman of

(r) *Joseph Kalluvilla v. Reserve Bank of India*, 1963(1) SCA 472 otherwise known as the Palai Bank Case.

the State Bank of India. All such directions are to be given through the Reserve Bank and the decision of the Central Government is final in respect of matters of public interests (s).

More or less all the Banks of the Country, except those which are called foreign Banks operating in India, have been nationalised. These nationalised Banks are carrying on business as Government of India undertaking. The work of the Banks has now been diversified and the Government has full control on them. This does not however, mean that the Control of the Reserve Bank of India upon the nationalised Banks has in any way been relaxed. The nationalised banks, are the agencies of Government, which have a large hand in controlling the policies. It is the Government which is laying down the economic policies and controlling the financial

Nationalised Banks. heights on the basis of sound commercial principles in doing business; it cannot be forgotten that it is the voice and the hand of the State that is effectively felt in all the activities. Banking undoubtedly is an activity vital to the life of the Community and it is undoubtedly a business of great importance. This being the nature of the institution and also its powers, there cannot be any doubt that the State Bank of India is either "State" or "other authority" within the meaning of that expression in Art. 12 of the Constitution. The State Bank of India, though not specifically called upon to perform governmental or quasi-governmental functions and though does not possess powers to enforce obedience at the pain of penalty, is still "other authority" within the meaning of that expression under Article 12 (t).

(s) *State Bank of India v. Kalpaka Transport*, A.I.R. 1979 Bom. at page 257.
(t) *State Bank of India v. Kalpaka Transport Co.*, A.I.R. 1979, Bom. 257.

COMPANIES—III

In respect of the position, rights and privileges of Companies incorporated in the United Kingdom and in India, the following provisions in the Government of India Act, 1935 will be of historical interest.

Sec. 113.—(1) Subject to the following provisions of this chapter, a company incorporated, whether before or after the passing of this Act, by or under the laws of the United Kingdom, and the members of the governing body of any such company and the holders of its shares, stock, debentures, debenture stock or bonds and its officers, agents and servants, shall be deemed to comply with so much of any Federal or provincial law as imposes in regard to companies carrying on or proposing to carry on business in British India requirements or conditions relating to or connected with—

- (a) the place of incorporation of a company or the situation of its registered office, or the currency in which its capital or loan capital is expressed; or
- (b) the place of birth, race, descent, language, religion, domicile, residence or duration or residence of members of the governing body of a company, or of the holders of its shares, stock, debentures, debenture stock or bonds, or of its officers, agents, or servants:

Provided that no company or person shall by virtue of this section be deemed to comply with any such requirement or condition as aforesaid if and so long as a like requirement or condition is imposed by or under the law of the United Kingdom in regard to companies incorporated by or under the law of British India and carrying on or proposing to carry on business in the United Kingdom.

(2) If and in so far as any total or partial exemption from, or preferential treatment in respect of taxation imposed on companies by or under any Federal or Provincial law depends on compliance with conditions as to any of the matters mentioned in subsection (1) of this section, any company incorporated by or under the laws of the United Kingdom carrying on business in British India shall be deemed to satisfy those conditions and be entitled to the exemption or preferential treatment accordingly so long as the taxation imposed by or under the laws of the United Kingdom on companies incorporated by or under the laws of British India and carrying on business in the United Kingdom does not depend on compliance with conditions as to any of the matters so mentioned.

114.—(1) Subject to the following provisions of this chapter,

a British subject domiciled in the United Kingdom shall be deemed to
Companies comply with so much of any Federal or Provincial
incorporated In law as imposes in regard to companies incorporated
India. or proposed to be incorporated, whether before or
after the passing of this Act, by or under the laws of British India, any
requirements or conditions relating to, or connected with, the place of
birth, race, descent, language, religion, domicile, residence or duration
of residence of members of the governing body of a company, or of
the holders of its shares, stock, debentures, debenture stock or bonds,
or of its officers, agents or servants:

Provided that no person shall by virtue of this section be deemed to
comply with any such requirement or condition as aforesaid if and so
long as a like requirement or condition is imposed by or under the law
of the United Kingdom in regard to companies incorporated or pro-
posed to be incorporated by or under the laws of the United Kingdom
on British subjects domiciled in British India.

(2) If and in so far as, in the case of any such companies as aforesaid,
any total or partial exemption from, or preferential treatment in respect
of, taxation imposed by or under any Federal or Provincial law depends
on compliance with conditions as to any of the matters aforesaid, then,
so far as regards such members of its governing body and such of the
holders of its shares, stock, debentures, debenture stock or bonds, and
such of its officers, agents and servants, as are British subjects domiciled
in the United Kingdom, any such company shall be deemed to satisfy
those conditions and be entitled to the exemption or preferential treat-
ment accordingly, so long as the taxation imposed by or under the
laws of the United Kingdom on companies incorporated by or under
those laws does not, as regards such of the members of a company's
governing body, or such of the holders of its shares, stock, debentures,
debenture stock or bonds, or such of its officers, agents, or servants, as
are British subjects domiciled in British India, depend on compliance
with conditions as to any of the matters aforesaid.

(3) For the purposes of this section, but not for the purposes of
any other provision of this chapter a company incorporated before the
commencement of Part III of this Act under any existing Indian law
and registered thereunder in Burma, shall be deemed to be a company
incorporated by or under the laws of British India.

In 1956 the Parliament of the Republic of India passed the Companies
Act 1956 with the following Statement of its Objects and Reasons.

"The object of this Bill is to amend and consolidate the law relating to
Companies. The last major amendment of the Indian Companies Act,
1913 (VII of 1913) was undertaken in 1936 when the Indian Companies
(Amendment) Act, 1936 (XXII of 1936) was passed. At the end of World
War II the need was felt for a further extensive revision of the Companies
Act. Apart from the experience gained of the actual working of the Amend-

ment Act of 1936, which disclose the necessity for an early amendment of some of its provisions, many changes had taken place in the intervening years in the organisation and management of joint stock Companies, and over a wide sector that was dominated by new elements in trade and industry, the character of company management had also materially altered. Further, at the end of the War, the Company Law Amendment Committee in the United Kingdom, more familiarly known as the Cohen Committee had submitted its report after a laborious enquiry spread over two years. This Report recommended several far-reaching changes in the English Companies Act, 1929. As the Indian Company law had been always largely based on the prevailing English law, the then Government felt that the time was ripe for a further review of the Indian Companies Act. A good deal of exploratory work was done between 1946 and 1950. Two distinguished company lawyers were successively appointed to advise Government on the broad lines on which the Indian Companies Act should be revised. The recommendations of these two lawyers were further examined in the then Ministry of Commerce, and certain tentative departmental views which emerged were circulated in a memorandum to the general public for eliciting opinion on them. Many representations on this memorandum were duly received from trade and industrial organisations, learned bodies, associations, State Governments and the general public. At the end of 1950, the Government of India appointed a Committee under the chairmanship of Sri C. H. Bhaba to go into the entire question of the revision of the Indian Companies Act, with particular reference to its bearing on the development of Indian trade and industry. This Committee examined a large number of witnesses in different parts of the country and submitted its Report in March 1952. The Report was circulated to all State Governments, Chambers of Commerce, many trade associations and several learned bodies for an expression of their views on the recommendations contained in it. A special officer was also appointed in the Department of Economic Affairs at the same time to examine the Report and, on the basis of the views expressed by these organised trade and other associations and the general public, to submit proposals to Government for the revision of the Indian Companies Act.

Indian Law was based on English Law.

Bhaba Committee.

“2. The present Bill is based largely on the recommendations of the Company Law Committee modified in a few particulars by the views expressed on these recommendations. The main principles underlying these recommendations are as follows:

- (i) the provisions of the law both in regard to the formation and management of joint stock companies, should be such as would ensure the maintenance of a minimum standard of good behaviour in company promotion and management without imposing needlessly irksome or rigid rules which may hamper legitimate business or affect initiative or enterprise;

- (ii) the law should provide for the fullest possible disclosure in prospectuses or statements in lieu of prospectuses issued, both before and after a company is formed, and failure to make

Principles kept in the foreground.

such disclosure should be visited with effective penalties;

- (iii) company accounts should be prepared in such a way as to disclose all facts which are material to a full understanding of the manner in which companies are worked;

- (iv) company meetings should be called and conducted in such way as to ensure that share-holders receive all reasonable facilities for exercising an intelligent judgment on the activities of the management;

- (v) the provisions for investigation into the affairs of a company should be so designed as to enable an appropriate authority to intervene in its affairs not merely when an offence has been committed, but also when it is established that the affairs of a company are being managed in a manner prejudicial to the share-holders of the company or oppressive to any substantial portion of them or when such investigation is otherwise necessary in the public interest;

- (vi) the law should also provide for the establishment of an appropriate authority not merely for enforcing the provisions of the Companies Act or for carrying out the investigations which may be necessary under it, but also for generally overseeing the administration of the Act and for exercising in the public interest that reserve of authority which must necessarily vest in some organ of Government.

The provisions of the Bill in its different parts follow largely from the above principles. The major changes in the present Indian Companies Act which the Bill introduces relate to the following topics:

- (a) the promotion and formation of companies (Clauses 50 to 74);
- (b) the capital structure of companies (Clauses 79 to 83);
- (c) company meetings and procedure (Clauses 158 to 189);
- (d) the presentation of company accounts, their audit, and the powers and duties of auditors (Clause 195 to 218);
- (e) the inspection and investigation of the affairs of companies (Clauses 219 to 235);
- (f) the constitution of boards of directors, and the powers and duties of directors, managing directors and managers (Clauses 236 to 306);
- (g) the appointment of managing agents, terms and conditions of their service, their remuneration, the powers of managing agents vis-a-vis directors, and the activities of managing agents in regard to borrowings, loans, contracts, sales and purchases (Cls. 307 to 359).
- (h) the administration of company law.

"Most of the new provisions contained in the Bill on all these points

are self-explanatory, and in the case of almost all these provisions the relevant notes on clauses have indicated the recommendations of the Company Law Committee on which they are based.

“3. As has been already mentioned, in a few particulars, the provisions of the Bill have deviated from the recommendations of the Company Law Committee. These deviations are, however, of a minor nature, and the notes on clauses have duly indicated and explained them. There is, however, one important deviation from the recommendations of the Company Law Committee which needs special mention. The Company Law Committee devoted a good deal of space in its Report to problems of organisation and administration, and recommended that the Central Government should not only resume its responsibility for the administration of joint stock companies which it had delegated to the State Governments, but that a statutory authority, at the Centre, to be called “Corporate Investment and Administration Commission”, should be set up under the new Act for the administration of the company law as well as for the discharge of other related functions, e.g., capital issue control and regulation of stock exchanges when a Central measure for this latter purpose was passed. Action has already been taken on the first recommendation of the Company Law Committee. The State Governments have been addressed regarding the intention of the Central Government to resume its powers under the Indian Companies Act and the constitution of a Central Organisation under the administrative control of the Department of Economic Affairs, has been sanctioned. It is, however, proposed that the question of conferring statutory status on this Organisation if so necessary be considered after this Central Organisation has been set up and functioned for a reasonable period. For the present therefore, the duties and responsibilities which the Company Law Committee visualised for the statutory authority would be carried on by the new departmental organisation.

A Central Organisation proposed.

“In the light of the recent experience of the Central Government, provision has also been made in the Bill in respect of one or two matters which were not covered by the recommendations of the Company Law Committee but which are considered to be of sufficient importance to the working of joint stock companies in future to justify the making of special provisions in regard to them (e.g., Cl. 366). The notes on the relevant clauses will explain the reasons for these provisions.

“4. It is necessary to draw attention in this context to two other recommendations of the Company Law Committee which have affected the structure of the Bill. In the Indian Companies (Amendment) Act, 1951 (LII of 1951), certain special powers were conferred on Courts of Law and the Central Government. While the powers conferred on the Courts by Section 7 of that Act were based largely on the provisions of Section 210 of the English Companies Act, 1948, the other powers conferred on the Central Government were of a quasi-administrative nature to be exercised on the recommendations of an Advisory Commission provided for under Section 8 of the

Powers of Courts and the Central Government.

Amendment Act. The Company Law Committee recommended that if and when the Indian Companies Act was comprehensively revised on the lines of its recommendations, Government should consider the desirability of repealing Sections 2, 3, 4, 5, 6 and 8 of the Amendment Act of 1951 containing these quasi-administrative powers. While it is not proposed to retain indefinitely these special powers, which the Central Government assumed in 1951 it is considered that it will not be expedient for the Central Government in the present circumstances of company management in this country, to divest itself of these powers till experience of the working of the new Act has shown that these special powers are no longer necessary. Clause 598 of the Bill, therefore, proposes the retention of these powers for a period of three years from the commencement of the new Act. The provisions of Sections 2, 3, 4, 5, 6 and 8 of the Amendment Act of 1951, which have been incorporated in the present Indian Companies Act as Sections 86-J, 87-AA., 87-B second proviso to Clause (c), 87-BB, 87-CC and 289-B, have, therefore, been relegated to a Schedule (Schedule XI) attached to this Bill. Section 7 of the Amendment Act, which it is proposed to incorporate permanently in the Companies Act, has been retained as Clauses 367 to 377. The notes on these clauses explain these structural changes.

“In regard to Table A in the present Act, the Company Law Committee recommended that having regard to the importance of the provisions contained in the compulsory regulations of this Table, it was desirable that they should be inserted as independent sections in the Act itself. The acceptance of this recommendation has involved the transfer to the body of the Bill of many of the provisions hitherto included in Table A. Further, in order to avoid unnecessary duplication, those regulations in Table A which merely draw attention to the relevant provisions of the Act have been omitted. In the result the new Table A has been considerably abridged. The notes on clauses relating to this Table explain these structural alterations.

“5. Advantage has been taken of the opportunity offered for the consolidation of the Act for the first time since 1913 to re-arrange its different Parts in a more logical order. The general principle has been to arrange the different Parts of the Act in such a way that they follow, as far as possible, the chronological sequence in the formation, growth and decay of companies. Thus, for example, it has been felt that the provisions of the Act which relate to the formation of companies should precede those relating to their management. The re-arrangement of matter which has followed as a consequence of this decision has entailed considerable changes in the structure of the present Act. It is, however, felt that these changes will eventually result in a better understanding and appreciation of the scheme of the Indian Companies Act”.

To continue the history of the development of the Company Law it must be mentioned that the Companies Act, 1956 came into operation on 1st April 1956 but soon thereafter due to certain unhealthy phenomena appearing in the field suggestions flowed in for further amendments. In

the field of legislation relating to companies one cannot expect finality as the law 'falls to be applied to a growing and changing subject matter and the growing uses of the company system as an instrument of business and finance and possibilities of abuse inherent in the system'. The Act of 1956 was therefore amended from time to time and more particularly in 1960, 1965 and 1969 incorporating significant changes in the law. Several vital amendments were made in 1974 as well. In the Statement of Objects and Reasons to the 1974 amendment it was said: A striking unhealthy phenomenon which has appeared in the corporate sector in recent times is a trend towards take-over of well established companies by individuals or groups or combines. It may be stated in this connection that the provisions of section 372 of the Companies Act, 1956 or section 23 of the Monopolies and Restrictive Trade Practices Act 1969, are not adequate to regulate the take-over of companies. Such take-overs are often unfair to the non-controlling share-holders, particularly the financial institutions, who are kept in the dark while secret negotiations are entered into by third parties with the controlling shareholders who have an edge over the other share holders in getting better price for their shareholdings. The noncontrolling shareholders are thus constrained to continue with their shares in the company, while the control passes into possibly undesirable hands. Safeguards were accordingly placed against such take-overs. Other measures were taken to remove other evils. In order to promote better observance by the companies of the laws relating to trade, industry and commerce it was made compulsory for large companies to have secretarial assistance. Provisions were made for having greater control over foreign companies in which fifty per cent of the share capital is held by citizens of India. The 1974 amendment also provided for an extension of the scope of section 43A of the Act so that some private companies satisfying certain conditions should be deemed to be public companies in certain circumstances in order to bring such companies under the discipline applicable to public companies.

Further steps to check unhealthy phenomenon.

The Companies Act, 1956 thus runs into 658 sections with a number of Schedules appended to it. The Statute is divided into as many as 13 parts and attempt has been made to make each part exhaustive and self-contained in respect of the matters dealt with therein, and each Part has been subdivided into different groups dealing with particular subjects. After the Preliminaries in Part I, the provisions for constitution of the Board of Company Law Administration is stated in Part I-A, introduced by the 1963 amendment and effective from 1st January 1964, and Sec 10-E lays down that the Central Government shall constitute such a Board to exercise and discharge such powers and functions conferred on that Government by or under this Act or any other law as may be delegated to it by that Government. Part II deals with incorporation of company and matters incidental thereto including registration of companies, their memorandum of association and Articles of Association and Contracts, Deeds and service of documents. Part III relates to

Different features of the Act of 1956.

Prospectus and allotment and other matters relating to issue of shares and debentures. Share Capital and Debentures and Registration of Charges which are to include mortgage are dealt with in Parts IV and V respectively. Part VI deals with the most important subject of Management and Administration and this Part has been very appropriately subdivided into several Chapters laying down the duties and obligations and the powers and limitations of Directors, Managing Agents, Secretaries and Treasurers and Managers. Chapter IV-A of this Part relates to the powers of the Central Government to remove managerial personnel from office on the recommendation of the High Court and Chapter VI speaks of the powers of the Court and of the Government for prevention of Oppression and Mismanagement. Part VII, subdivided into 5 Chapters deals with Winding up matters i.e., winding up by the Court, Voluntary winding up, Winding up subject to supervision of Court and gives details of provisions which are applicable to every mode of winding up. There had been statutes relating to companies since 1857 and for a full century companies have formed and functioned under that and different other Acts. Chapter VIII of the 1956 Act very naturally makes provisions for the application of the 1956 Act to Companies formed or registered under the previous company Laws, followed by Chapter IX which relates to the capabilities, formalities and conditions to be complied with by Companies authorised to register under the 1956 Act. Unregistered Companies have not been left out also and Part X of the Act relates to winding up of such companies. Part XI relates to Companies incorporated outside India i.e., foreign companies. While Part XII relates to Registration Offices, Office and Fees Chapter XIII of the 1956 Act lays down quite a large number of provisions described as General. They include matters of collection of information and statistics from companies, application of the Act to Government Companies, special provisions as to companies in Goa, Daman and Diu and also in Jammu and Kashmir and of offences and their penalties and legal proceedings and levy of fees, Annual report on the working of the Act, rule making powers of the Central Government and of the Supreme Court and also the usual features of Repeals and Savings, followed by Schedules of different categories.

A Company formed and registered under this Act and any Company formed and registered under any of the previous Acts and existing now will be deemed to be a Company under this Statute. A private company means

Private and Public Companies. a company which, by its articles, (a) restricts the right to transfer its share, if any, (b) limits the number of its members to fifty not including its employees, past and present, and (c) prohibits any invitation to the public to subscribe for any shares in, or debentures of, the company: provided that where two or more persons hold one or more shares in a company jointly, they shall, for the purposes of this definition, be treated as a single member. A Public Company means a company which is not a private company. The Industrial Credit and Investment Corporation of India, Ltd., The Industrial Finance Corporation of India, The Industrial Development Bank of India, The Life

Insurance Corporation of India and the Unit Trust of India are specified in the Act as 'Public Financial Institution' under Sec 4-A as inserted in 1974. The definition Section 2(7) of the Act says that a body corporate or corporation includes a company incorporated outside India but does not include a corporation sole, a co-operative society and other body corporate (not being a company as defined in this Act) which the Central Government may, by notification, in the official Gazette, may specify in this behalf. A Government Company means a Government company within the meaning of Sec 617 which lays down that it means any company in which not less than fifty-one percent of the paid up share capital is held by the Central Government, or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments and includes a company which is a subsidiary of a Government company as thus defined.

By the word "articles" is meant the articles of association of a company as originally framed or as altered from time to time in pursuance of any previous companies law or of this Act including, so far as they apply to the company, the regulations contained in the respective Tables appended to the previous Companies Acts or in Table A in Schedule I annexed to the present Act. The term "Memorandum" means the memorandum of association of a company as originally framed or as altered from time to time in pursuance of any previous companies law or of this Act. Sec 9 of the present Act, however, lays down: Save as otherwise expressly provided in the Act—(a) the provisions of this Act shall have effect notwithstanding anything to the contrary contained in the memorandum or articles of a company, or in any agreement executed by it, or in any resolution passed by the company in general meeting or by its Board of directors, whether the same be registered, executed or passed, as the case may be, before or after the commencement of this Act; and (b) any provision contained in the memorandum, articles, agreement or resolution aforesaid shall, to the extent to which it is repugnant to the provisions of this Act, become or be void, as the case may be. That is, the Act overrides them wherever they are found to be repugnant to the provisions of the Act.

Articles and
Memorandum

The Companies Act, 1956 is a codifying statute as distinguished from a consolidating statute. The latter would be a statute collecting different statutory provisions on a particular topic and gathers them, tinkered with amendments, into a single Act. But the Companies Act is a complete code exhaustively stating the whole law on the subject. Dealing with the question of interpretation of the provisions of a codifying Act, Maxwell in his treatise on the interpretation of Statutes quotes Lord Herschell who said in the leading case *Bank of England v Vagliano Brothers* (a). "I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived

A codifying statute
and rules of inter-
pretation.

(a) 1891 A. C. 107.

from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a statute, intended to embody in a code of a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost destroyed, and the very object with which it was enacted will be frustrated." Maxwell further says, the law is now to be determined by interpreting the language used, not (as before) "by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decision (Maxwell, 12th Ed, pages 25-26). The above principle thus gives the proper guidance for interpreting the Companies Act, 1956.

As one reads through the Act he will come across definitions of a large number of words and expressions. Their presence in the statute is quite unavoidable and the definitions are both inclusive and otherwise. In laying down certain principles as to how such definitions are to be construed the Supreme Court said in the case *S. K. Gupta v K. P. Jain*, (b) where in a definition clause the word 'include' is used, it is so done in order to enlarge the meaning of the words or phrases occurring in the body of the statute when it is so used, these words and phrases must be construed as comprehending not only such things which they signify according to their natural import, but also those things which the interpretation clause declares that they shall include (c). Where in a definition section of a statute a word is defined to mean a certain thing, wherever that word is used in that statute, it shall mean what is stated in the definition unless the context otherwise requires. But where the definition is an inclusive definition, the word not only bears its ordinary, popular and natural sense whenever that would be applicable but it also bears its extended statutory meaning. At any rate, such expansive definition should be so construed as not cutting down the enacting provisions of an Act unless the phrase is absolutely clear in having opposite effect (d). Where the definition of an expression in a definition clause is preceded by the words 'unless the context otherwise requires', normally the definition given in the section should be applied and given effect to but this normal rule may, however, be departed from if there be something in the context to show that the definition should not be applied (e). It would thus appear that ordinarily one has to adhere to the definition and if it is an expansive definition the same should be adhered to. The frame of any definition more often than not is capable of being made flexible but the precision and certainty in law requires that it should not be made loose and kept tight as far as possible (f).

The Memorandum of a Company may be compared to the Charter of

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- (b) A. I. R. 1979 S. C. 734.
 - (c) See *Dilworth v. Commr. of Stampa* 1899 A. C. 99 at p. 105.
 - (d) See *Jobbins v. Middlesex County Council*, 1949 1 K. B. 142.
 - (e) See, *Khanna J in Indira Nehru Gandhi v. Raj Narain*, A. I. R. 1975 S. C. 2299.
 - (f) See, *Kalya Singh v Genda Lal*, A. I. R. 1975 S. C. 1634.

a Chartered Company and as pointed out earlier the Objects of a Company must be set out in the memorandum with reasonable care. So that it is treated as a document from which the powers of a Company can be determined. The memorandum must also state the main objects as also the incidental and ancillary objects of the Company. Section 13 of the Companies Act, 1956 lays down the requirements with respect to memorandum in Table D in the Schedule appended to the Companies Act, 1956 which sufficiently indicates as to how the memorandum should be drawn up and gives a general idea of what should ordinarily contain therein both in respect of Company limited by guarantee and having a share capital and also of an unlimited Company.

Memorandum of a Company

A Company shall not alter the conditions contained in the memorandum except in the cases, in the mode and to the extent, for which express provision is made in the Act and Section 17 of the Act provides that a Company may, by special resolution alter the provisions of the memorandum with respect to the objects of the Company so far as may be required to enable it to (a) carry on its business more economically or more efficiently; (b) to attain its main purpose by new or improved means; (c) to enlarge or change the local area of its operations; (d) to carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the Company; (e) to restrict or abandon any of the objects specified in the memorandum; (f) to sell or dispose of the whole, or any part, of the undertaking, or of any of the undertakings of the Company; or (g) to amalgamate with any other Company or body of them.

A mere passing of the special resolution will not make any alteration effective. The alteration is subject to examination and confirmation by the Company Law Board which must satisfy itself that notices of alteration have been duly served on the holders of debentures of the Company, every creditor who is entitled to object to the alteration, the Registrar with reasonable opportunity to state his objections and suggestions, on any other person or class of persons whose interests are likely to be affected by the alteration. After applying its mind properly to the matter the Board may confirm the whole or part of the proposed alteration and impose terms and conditions, having regard to the rights and interests of the members of the Company and of every class of them. If the Company Law Board issues order confirming the alteration it is the duty of the Company to file a Certified Copy of that Order and a printed copy of the memorandum as altered, to the Registrar within three months from the date of the order, who shall register the same and issue a certificate. Such certificate shall be the conclusive evidence that all requirements of the Act with respect to alteration and confirmation thereof have been complied with (Sec. 18). The provision for constitution of the Company Law Board was inserted in the Act by an amendment in 1963 and such a Board was constituted by the Central

Effective alterations—
how to be made.

Government in 1964 but the powers invested in the Board under Sec. 17 of the Act had continued to be exercised by the "Court". The word "Court" in the Section was substituted by the Company Law Board with effect from 1st February, 1975 by the Companies (Amendment) Act of 1974. The responsibility of the Company Law Board in the matter of dealing with the question of alteration of a memorandum of a Company is therefore of no less importance than it would have been had the Court exercised that power.

It was held by the Allahabad High Court in *Jugglilal Kamlapat's case*(g) that it would be wrong to refuse confirmation of alteration of memorandum simply because the proposed new business was not connected with the existing business of the Company. But such proposed new or additional business should not be either destructive of or inconsistent with the existing business though it may not be akin to or connected with the one existing. Again in another case *Mahaluxmi Bank Ltd. v. Registrar of Company* (h) the Calcutta High Court said that once an order is made for deletion of the clauses in a memorandum relating to carrying of Banking business and the order became conclusive upon registration under Sec. 18, it would be an act of illegality on the part of the Company to transact banking business. To do such business is directly in violation of the decision of the authority.

The *ultra vires* rule is meant for the protection of the share-holders as well as of the creditors and Sec. 17(5) enables the Board to allow opportunity to a Company in a proceeding under this section to make arrangements for the purchase of interests of the dissentient members but no part of the capital of the Company may be expended for any such purchase as that would be tantamount to an improper reduction of capital of the Company.

So far as taking up new or additional business is concerned one may recall the case of *Foster v. London, Catham and Dover Rail Co.* (i) where the leasing of the arches, upon which the railway was erected, to workshops was not declared to be *ultra vires* as it was not only incidental to the powers of the Company but it also added to the projects of the Company though the lessees might cause noise and nuisance to the neighbours. Similarly, additional business within the powers of the Company according to the memorandum if the directors held the honest opinion that such business was not *ultra vires* the Company (j) and a company would be permitted to sue

Additional business. to recover damages against third party who had cut its telephone wires which the Company had laid at a place where, according to the memorandum, it had no power to lay the telephone line (k). Diversification of activities calculated for the benefit of the Company cannot be discouraged but no Company can be allowed to do *ultra vires* acts in the name of such diversification. The case of *Jon Beauforte (London) Ltd.* is in point. The Company carried on the business

(g) A. I. R. 1966 All. 417.

(h) A. I. R. 1961 Cal. 666.

(i) 1895 IQB 711.

(j) *Bell Houses Ltd. v. City Wall Properties Ltd.*, 1966-2 A. E. R. 674.

(k) *National Telephone Co. v. Constable of St. Peter Port*, 1900 A. C. 1317.

of gown-makers and was authorised to enter upon other activities of the same kind. The Company, however, erected a factory for manufacturing veneered panels and ultimately the firm went into liquidation. The new venture was considered to be *ultra vires* the Company. The liquidators rejected all claims of creditors in respect of the new business as they were imputed with the constructive notice of the Company's business (l). Again where the memorandum authorises a Company to borrow money it may utilise the power for legitimate purposes of the Company and not otherwise. Where a Company was formed for providing facilities and informations for the visitors of an Exhibition or Festival in 1951 the Company engaging itself to pig-breeding was held to be *ultra vires* (m). Therefore the power to do new or additional business will not cover acts relating to entirely new business (n) when the power is limited to the main object of the Company. There are however certain implied powers such as the payment of pension and gratuity if such payment is for the benefit of the Company and is incidental to its business (o) but pension to widow of a managing director was, however, not allowed on the consideration that it was not reasonably incidental to its business. Similarly where payment of a pension for life was for the sole benefit of widow it was held to be *ultra vires* (p). So on sale of a company payment by it of compensation to employees as a gesture of sympathy was held not bonafide (q). While making alteration to the memorandum the Company will not be allowed to make any fundamental change of its objects excepting where such change would help the Company in carrying on its business more economically or efficiently (r) and so also alteration will be refused if the proposed change would result in restricting or abandoning any of the objects specified in the memorandum (s). Article of Association cannot extend the scope of Memorandum of Association as was held by the Supreme Court in *Dr. A. Lakshmanswami Mudaliar v. L. I. C.* (t). In that case the primary object of the Company was to carry on life insurance business through its different branches. The Company, however, made contributions out of its funds for the benefit of a trust for charitable purposes. The Court held that such contributions were not incidental to the object of the Company. The contributions were not conducive to the Company either. The Company's act in making such contribution was therefore *ultra vires*. It was absolutely void and could not be made effective even by ratification by all the share-holders. The Supreme Court went so far as to say that the office bearers of the Company responsible for passing such *ultra vires* resolution

(l) 1953, Ch. 131.

(m) *Re. Introductions Ltd.*, 1968—2 A. E. R. 1221.

(n) *London Financial Association v. Kelk* 11884—26 Ch. D. 107.

(o) *Hampson v. Price's Patent Candle Co.*, 1876 45 L.J. Ch. 437 and *Re. Lee, Behrens & Co. Ltd.*, 1932, 2 Ch. 46.

(p) *Re. W. and M. Roith Ltd.*, 1967 I-A. E. R. 427.

(q) *Parke v. Daily News Ltd.*, 1962, 2-A. E. R. 929

(r) *Re. Scientific Penalty Breeders' Association*, 1933 Ch. 227.

Re. Hampstead Garden Suburb Trust Ltd., 1962, 2-A. E. R. 879.

(t) 1963 S. C. 1185.

were personally liable to make good the loss of the Company and the Court ordered refund of Rs. 2 lakhs from the trustees who received the donation.

The American Law Institute some time back prepared a model Business Corporation Act proposing abrogation of the doctrine of *ultra vires* as a defence and pointing out, inter alia, the frustration of third parties in having remedies on *ultra vires* transactions. The complexities involved in giving

relief to third parties in such circumstances will appear in the discussions in two noted English decisions of 1914 and 1951 (u). The suggestion for abrogation does not seem to be appropriate in company matters as the principles laid down in 1875 in *Ashbury v. Riche* (v) have, with benefit, been respected, followed and developed during more than a century. Perhaps some in-built statutory provisions in Company laws will solve at least some of the problems.

There are two kinds of Share Capital, one is the Preference Share Capital which broadly speaking means that part of the Share Capital of the Company which assures preferential right to be paid a fixed amount of dividend or a dividend calculated at a fixed rate and fulfils the other requirement that on winding up or re-payment of capital there is a preferential right to be repaid the amount of the capital paid up or deemed to have been paid up. The other share capital is the Equity Share Capital which would mean all Share Capital other than the preference share capital. Sec. 100 of the Act of 1956 lays down that a Company having a share capital may if so authorised by its articles, by special resolution and subject to confirmation by the Court, reduce its Share Capital in any way and may, if and so far as is necessary, alter its memorandum by reducing the amount of its Share Capital and of its shares. The special resolution for reduction of Capital must be submitted to the Court for an order confirming the reduction. The Court has to follow the provisions laid down in Sec. 101 which are mainly directed to consider the objections of creditors and settlement of the case of objecting creditors. Where, however a proposed reduction of Share Capital involves either the diminution of any liability in respect of unpaid Share Capital or the payment of any share-holder of any paid up Share Capital, the Court may, if, having regard to any special circumstances of the case, it thinks proper so to do, direct that the provisions relating to creditors shall not apply. The test for confirming or refusing reduction of Share Capital would be whether the reduction would be inequitable in the interests of the public, the creditors and the members and if the answer is in the affirmative it will reject the proposal otherwise the Court will allow the proposed reduction (w). Any way, the articles of association cannot extend the scope of memorandum of Association (x) and where a resolution for reduction is made in terms of the article

- (u) *Sinclair v. Broughan*, (1914) A. C. 398 (HL); *Ministry of Health v. Simpson*, (1951) A. C. 251.
- (v) (1875) L. R. 7-HL 653.
- (w) *Expate Westburn Sugar Refineries Ltd.* 1951 A.C. 625.
- (x) A. I. R. 1963 S.C. 1185.

it will be a void action and there cannot be ratification of a void action (y). If any officer of the Company knowingly conceal the name of any creditor entitled to object to the reduction or knowingly misrepresents the nature or amount of the debt or claim of any creditor or abets or is privy to such concealment or misrepresentation is punishable with imprisonment or with fine or both.

Sec. 108 and 110 of the Act relate to transfer of shares but Section 111 of the Act empowers a Company to refuse registration of transfer of, or the transmission by operation of law of the right to, any shares or interest of a member in, or of debentures of the Company. The aggrieved person has the right to prefer appeal to the Central Government against any such refusal within two months from the date of refusal. The proceedings in appeal are confidential and no suit, prosecution or other legal proceedings shall lie in respect of any allegation made in such proceedings, orally or otherwise. But refusal by Company to register transfer of shares where such power has not been reserved in the articles of association is *ultra vires* the powers of the Company (z). In dealing with the appeal, the Central Government has the statutory obligation to cause reasonable notice to be given to the Company and to the transferor and the transferee and give the parties reasonable opportunity to make their representations, if any. It may call upon the Company to disclose the reasons for such refusal and if no disclosure is made the Government may, notwithstanding anything contained in the articles of the Company, presume that the disclosure, if made, would be unfavourable to the Company. After applying its mind to the *lis* the Central Government shall pass order, in writing, and direct either that the transfer or transmission shall be registered by the Company or that it need not be registered by it; and in the former case the Company shall give effect to the decision within 10 days of the receipt of the order. In the order the Government may give such incidental or consequential directions as to the payment of costs or otherwise as it thinks fit. Though the proceedings in the appeal are confidential the nature of the proceedings before the Government is judicial and not administrative. It is not even quasi-judicial (a). The Central Government may, however, by virtue of Sec. 250 impose restrictions upon shares and debentures and prohibit transfer of shares and debentures in certain cases whether, in connection with any investigation under Sec. 247, 248 or 249 or otherwise and so long as such restrictions remain in force any transfer of those shares will be void and there will be no voting right exercisable in respect of these shares.

Every Company limited by shares and every Company limited by guarantee and having a share capital shall, within a period of not less than one month and not more than six months from the date of which the Company

(y) *Firestone Tyre & Rubber Co. v. Synthetic & Chemicals Ltd.*, 1971—47 Comp. Cases 377.

(z) *Jalpaiguri Cinema Ld. v. Pramata*, 1971, 41 Comp. Cases 141.

(a) *Harinagar Sugar Mill v. Shyam Sunder*, A. I. R. 1961 S.C. 1669.

is entitled to commence business, hold a general meeting of the members of the Company. This meeting is called the Statutory meeting (b). Every Company shall in each year hold an annual general meeting and shall specify the meeting as such in the notices calling it and not more than 15 months shall elapse between the date of one annual general meeting of a Company and that of the next (c). In default and upon application of any member of the Company, the Central Government may call, or direct the calling of the general meeting and subject to the directions of the Central Government such general meeting shall be deemed to be annual general meeting (d). Again, the Board of Directors of a Company shall, on the requisition of a certain percentage of members, forthwith proceed duly to call an extraordinary general meeting of the Company and where the Board does not call for such meeting in spite of due compliance with the requirements provided in subsec. (5) of Section 168 of the Act, the requisitionists themselves may call the meeting but such meeting shall not be called after the expiry of three months from the date of deposit of the requisition.

Every notice of a meeting of a Company shall state the place and the day and the hour of the meeting and shall contain a statement of the business to be transacted at the meeting and the notice must be given to every member of the Company; to their legal representatives upon death or insolvency and explanatory statements as mentioned in Sec. 173 are to be annexed to the notice. Where the notice of meeting did not specifically contain or mention the business to be transacted and it is also found that all the members were not present at the meeting resolutions passed at the meeting even for issue of further capital must be held to be invalid (e) and the Orissa High Court held that when the notice of meeting is invalid the resolutions passed at the meeting are invalid too (f). "The article of association of a Company made it lawful for a special general meeting to determine upon the propriety of selling, disposing or otherwise dealing with the business, goodwill, property and effects of the Company. The Directors agreed to amalgamate and the agreement was approved by meetings of the share-holders. Mellish J. held the agreement was *ultra vires* there being no special words in the clause giving power to amalgamate with another Company. If the above clause was intended to mean power to amalgamate and bind the Share-holders absolutely that word should have been used" (g).

Normally the Articles of Association fix the voting rights of members. But Sections 181 and 182 of the Act place certain restrictions upon the voting rights of certain categories of members and Sec. 181 enables a Company to

(b) See Sec. 165.

(c) See Sec. 166.

(d) See Sec. 167.

(e) *Ramjilal Biswal v. Baiton Cables*, I. L. R. 1964 14 Raj. 135.

(f) *Santi Prasad Jain v. Kalinga Tubes*, A. I. R. 1962 Orissa 202.

(g) *Re. Empire Assn. Corp. v. Dougan's Case*, L.R. 8 Ch. 540.

provide in its articles that no member shall exercise any voting right in respect of any shares registered in his name on which any calls or other sums presently payable by him have not been paid, or in regard to which the Company has, and has exercised any right of lien. A lien is an equitable charge on shares and the Company can exercise such lien limited to the extent of the unpaid calls or debt owed by the member to the Company and for which the lien can be enforced by sale of the member's share. There must, however, be provisions about all these in the Articles of Association of the Company. But as provided in Sec. 182 of the Act a public Company or a private Company which is a subsidiary of a public Company, shall not prohibit any member from exercising his voting right on the ground that he has not held his share or other interest in the Company for a specified period of time preceding the date on which the vote is taken, or any ground not being a ground set out in Sec. 181. Interpreting Sec. 182 the Madhya Pradesh High Court held that restrictions on the share-holder's voting right on the basis of number of shares is inoperative and therefore illegal (h).

Voting Rights.

There is statutory classification of resolutions of meetings into two categories—Ordinary and Special. A resolution shall be an ordinary resolution when at a general meeting of which the notice required under the Act has been duly given and the votes cast in its favour exceed the votes cast against the resolution by members so entitled and voting. There is no measure as to the quantum of the majority vote. But a Resolution shall be a special resolution when the intention to propose the resolution as a special resolution has been duly specified in the notice calling for the general meeting and the notice required under the Act has been duly given of the general meeting and the votes cast in favour of the resolution are not less than three times the number of the votes, if any, cast against the resolution by members so entitled and voting (i). Such special resolutions are necessary for the more important decisions including alterations of the Articles, reduction of Capital subject to supervision of the Court, initiating compulsory or voluntary winding up. Payment of very costly presents to the Company's Chairman made out of its assets not out of its profits without any special resolution was held *ultra vires* (j). Again, where in a Company at least 25% of the subscribed share capital is held, whether singly or in any combination by—(a) public financial institution or a Government Company or the Central Government or any State Government; (b) any financial or other institution established by any provincial or State Act in which the State Government holds at least 50% of such share capital or (c) a nationalised bank or insurance Company carrying on a general insurance business—the appointment or reappointment at each annual general meeting of an auditor or auditors shall be made by a special resolution (k). Besides,

Resolutions.

(h) In re *Pasari Flour Mills*, A. I. R. 1961 M. P. 340.

(i) See Sec. 189.

(j) Re *George Newman & Co.*, 1895 1 CL 674.

(k) See Sec. 224.

a special notice is required for a resolution at an annual general meeting appointing as an auditor a person other than a retiring auditor, or providing expressly that a retiring auditor shall not be re-appointed (l). This is so apparently because in so dealing with such an auditor the resolution might have the effect of throwing some reflection on the conduct of the auditor concerned; Sec. 226 of the Act lays down the qualifications and disqualifications of auditors while Sec. 227 catalogues the powers and duties of auditors. These are statutory duties and the Court can also call upon directors to appear before auditors appointed by the Court to submit explanation and answer queries raised by them (m). But no question of any resolution is involved when the Central Government, as empowered by Sec. 233-A of the Act, directs a special audit of a Company's accounts and for that purpose may appoint either a Chartered Accountant or the Company's auditor himself to conduct such audit. But the Central Government will direct such special audit when it is of opinion (a) that the affairs of the Company are not being managed in accordance with sound business principles of prudent commercial practices or (b) that it is being managed in a manner likely to cause serious injury or damage to the interests of the trade, industry or business or (c) that the financial position of the Company is such as to endanger its solvency. A special resolution is necessary where a limited Company, if so authorised by the articles of association, desires to make the liability of its director or directors or its managing agent, secretaries and treasures unlimited (n) and upon the passing of such resolution the provisions thereof shall be as valid as if they had been originally contained in the memorandum. Again a contract between a Company and its managing agent or an associate of the managing agent for the sale, purchase or supply of any property, moveable or immovable, or for the supply or rendering of any service other than that of managing agent or for the underwriting of any shares or debentures to be issued or sold by the Company shall not be valid against the Company unless the contract has been approved by the Company by a special resolution passed by it setting out the material terms of the contract proposed to be entered into or already entered and approved by the Central Government either before the date of the contract or at any time within three months next after that date.

Again to remove all doubts and confusion Sec. 651 of the Act provides: Any reference to an extraordinary resolution in the articles of a company, or in any resolution passed in general meeting by the company, or in any other instrument, or in any law in force immediately before the commencement of this Act, shall, with effect on and from such commencement, be construed as a reference to a special resolution.

Section 235 to 251 should be studied together as they relate to investigation at the instance of the Central Government into the affairs of a Company. Such investigation may be initiated by the Central Government on receipt

(l) See Sec. 225.

(m) *Bhavanagar Vegetables v. Official Liquidator* (1977) 47 (Comp. Cases 128).

(n) See Sec. 323.

of application by some members of the Company or on the report of the Registrar (o). The Central Government may as well direct investigation into the affairs of the Company, if that Company by a special resolution or the Court by order declares that the affairs of the Company ought to be investigated by an inspector appointed by the Government and it may do so when it finds circumstances existing suggesting that the business of the Company is being conducted with intent to defraud its creditors, members or other persons; person concerned in the formation of the Company are guilty of fraud, misfeasance or other misconduct or suppression of information, etc. Extensive powers have been given to the investigating machinery so that the probe is a thorough and exhaustive one and provisions have also been made to make reports of the investigation effective. The powers of directing investigation by appointment of inspectors are discretionary and so the Central Government must first satisfy itself that there are good grounds for such investigation and then exercise the powers given by the Statute (p). The opinion of the Central Government may also be challenged as being on collateral grounds and if that challenge is substantiated the action of the Government will be beyond the scope of the Statute and therefore *ultra vires* (q). Again when the order for investigation is challenged on the ground that there was absence of proper materials and there was absence of legal excuse it is the duty of the Government to disclose the circumstances which led to the formation of the opinion. If the Government does not disclose the circumstances but simply pleads a denial the order for investigation will be considered *ultra vires* and will be quashed (r). The inspectors appointed for the purpose of investigation of the affairs of a Company may, if they think necessary, investigate also the affairs of any other body corporate which is, or has at any relevant time been the Company's subsidiary or holding Company or a subsidiary of its holding Company, or a holding Company of its subsidiary and also of any other body corporate which is or has been managed by any person as managing agent or associate of a managing agent or Secretary or Treasurer or any other body corporate managed by the Company's nominee (s). That is exactly the reason why Sec. 238 prohibits the appointment of a firm, body corporate or other association as inspector. Expenses of investigation shall at the first instance be defrayed by the Central Government and the Company shall be liable to reimburse the Government to the extent and under the circumstances mentioned in Sec. 245 of the Act. Investigation once initiated shall not be stopped even if there is voluntary winding up of the Company or the Company has passed a special resolution for voluntary winding up.

It must be kept in mind that it is not obligatory for the Central Govern-

(o) See Sec. 235.

(p) *Rohtas Industries v. S. D. Agarwal*, A. I. R. 1969 S C. 707. *Ramkrishna v. Tandolkar*, A. I. R. 1958 S. C. 538.

(q) *Barium Chemical Ltd. v. Company Board*, A. I. R. 1967 S C. 295.

(r) *Sahu Jain Ltd. v. Dy. Sec., Finance* (1965) 2 Comp. Law Journal 145 (Cal.).

(s) See Sec. 239.

ment to direct an investigation. Again, unlike the power of the Court in a proceeding for winding up of a Company, the discretionary power of the Central Government to direct investigation is neither judicial nor quasi-judicial. Therefore investigation on a complaint under Sections 235/237 may not be an adequate substitute for proceedings in Court on a winding up petition. A petition under sections 235/237/239 may not afford an equally efficacious and alternative remedy as a petition under Section 439 to the Court for winding up of the Company. When, therefore, the Court is already seized of the matter at the instance of a party, the Central Government should refrain from taking the initiative. Even when inspectors report that it is expedient to move the Court for winding on the ground that it is just and equitable to do so or that application for an order under Section 397 or 398 be made, then also the Government must stay its hands from doing so if the proceeding for winding up of the Company are already being taken by the Court (t).

Chapter II of Part VI of the Act relates to the constitution of the Board of Directors. A public Company shall have at least three directors and every other company at least two directors but no body corporate, association or firm shall be appointed director of a Company. Directors.

In other words, only an individual shall be so appointed. Subscribers of the memorandum of association shall be deemed to be directors of the Company, subject of course to any regulation in its articles. Appointments and retirements go by rotation. Increase in the number of directors would require sanction of the Central Government so also amendment of provisions in articles or memorandum of association relating to managing whole-time or rotational directors or their re-appointment but the Board of Directors may appoint additional directors for a temporary period. Appointment of directors should be made in two stages, that is, first there shall be a resolution agreeing for such appointment and thereafter a motion shall be made for appointment of two or more persons as directors and a resolution made in contravention thereof shall be void. So when a single resolution is passed to elect two or more directors it would be a contravention of Sec. 263(1) and so such resolution is *non est* in the eye of law (u). But insolvent, a person of unsound mind, a person convicted of moral turpitude and defaulter in paying call money of shares are not qualified to be appointed director and no person shall hold office as director in more than 20 Companies at one time. Directors may be removed by the Company by an ordinary resolution but special notice about it must be given and vacancy created by such removal shall also be made by a similar resolution subject to service of special notice of the intended appointment.

The Board of Directors shall exercise all such powers and do all such acts and things as the Company will authorise but it cannot do so in respect of matters the power to exercise which can only be exercised or done by the

(t) *Mool Chand v. Jaganath Gupta & Co.*, A. I. R. 1979 S. C. 1038.

(u) *Raghumath*, 1966-2 Comp. L. J. 100 All.

Company in general meeting (v) A contract which is not permitted to be made according to the memorandum of association is void thereto and as such it cannot be validated at any time (w). The Board, however, shall have powers to make calls on share-holders for money unpaid, to issue debentures, to otherwise borrow money, to invest the funds of the Company and to make loans only after passing resolutions at the meetings of the Board but still the Company can impose restrictions on those powers of the Board. Besides this, Sec. 293 imposes statutory restrictions on the powers of the Board in matters of sale, lease, investment and borrowings and contributions to charitable and other funds not directly relating to the business of the Company or the welfare of its employees. As pointed out earlier, when the *Daily Newspaper Ltd.*, was being sold, in England, to another newspaper group the company decided to make payment of compensation to its employees and pensioners obviously to 'to behave generously' to them but such payment was held to be *not bona fide* (x). Again payment of pension to the widow of a director was for benefiting the widow only so it was held again to be *not bona fide* as it was not incidental to the Company's business (y) but contribution to scientific institution by a chemical firm was considered reasonable as that would increase the number of trained chemists (z). Contribution by a life insurance business to trusts for charitable purposes was held *ultra vires* and refund of the donation was ordered by the Supreme Court (a). Political contributions are, however, allowed under the English Statute on Company law. But Sec. 293A of the Companies Act, 1956 makes statutory prohibition against such contribution. It specifically lays down that no Company or its Board of Directors shall contribute any amount or amounts (a) to any political party, or (b) for any political purpose to any individual or body and contravention of this prohibition will make the Company or the officers concerned liable to punishment with fine and imprisonment in addition to fine. This Section 293-A was inserted in the Companies Act by amendment in 1969. Earlier to this amendment it was judicially held that if the memorandum of association did not make provision for power to contribute to a political party such contribution would be *ultra vires* and once it was found to be *ultra vires* it cannot be ratified thereafter even if all the share-holders agreed nor any subsequent alteration of the memorandum even by sanction of the Court will validate such contribution by the doctrine of relation back (b). This is based upon the principle that transactions which are absolutely illegal or *ultra vires* cannot be ratified. Since after this prohibition introduced in the Statute a company cannot make any contribution to any political party or for any political purpose even

(v) See, Sec. 291.

(w) *In re. Steel Equipment*, 1961-1 Comp. L. J. 172.

(x) *Partee v. Daily Newspaper Ltd.* 1962-2 All ER 929.

(y) 1967-1 All ER 427.

(z) *Evans v. Brunner, Mond & Co.*, 1924 -1 Ch. 359.

(a) *A. L. Mudaliar v. L. I. C.*, A.I.R. 1963 S. C. 1185.

(b) *Indian Steel & Wire Products v. C. I. T., West Bengal*, 1968-1 Comp. L. J. 191.

if there is provision for making such payments in the articles of association of any Company inasmuch as such provision will be *ultra vires* the Companies Act which has the over-riding effect by virtue of Section 9 of the Statute itself. But it was held in a Calcutta case that though such contribution is prohibited, contribution to advertisements, or publishing advertisements on payment, in the Souvenir of a political party is not prohibited. This view is based upon the theory that contribution as contemplated in the Statute is payment without consideration but by contribution to advertisements some benefit is derived by the Company (c). There is, however, an embargo upon advancing loans or providing guarantee or security in connection with loans made by any other person to, or to any other person by (a) any director of the lending Company or a company which is its holding Company or any partner or relative of any such director (b) any firm in which any such director or relative is a partner; (c) any private Company of which any such director is a director or member; (d) any body corporate where such director holds or controls 25% of the voting power or (e) any such body corporate which acts in accordance with directions or instructions of such directors or Board of directors, unless previous approval of the Central Government is obtained in that behalf. Such approval of the Central Government would not, however, be required in case of loans, guarantee or security, by a private Company, a banking Company by a holding Company to its subsidiary Company (d). A director shall not hold any office or place of profit under the Company except with the consent of the Company accorded by a special resolution but in no case a director shall make assignment of his office. Any such assignment shall be void. This is the statutory provision and what is void cannot be validated subsequently even by a special resolution.

Chapter III of Part VI of the Act relates to Managing Agents. The Act of 1956 liquidates the managing agency system. Sec. 324-A inserted by amendment of the Act in 1969 clearly lays down that

Managing Agents. notwithstanding anything contained in any other provisions of this Act or in the memorandum or articles of association or in any contract to the contrary, where a company has on the 3rd day of April, 1970, a managing agent or Secretaries and treasurers, the term of office of such managing agent or, as the case may be, the Secretaries and treasurers shall expire, if it does not expire earlier, on that date. No company shall appoint or re-appoint any managing agent or secretaries and treasurers on or after the 3rd day of April, 1970. And Sec. 367 of the Act provides that where the office of a managing agent ceases or is terminated, the managing agent and the Company shall be entitled to enforce any claims or demand which each may have against the other, in respect of anything done or omitted to be done by either of them before the cessation or termination of the managing agency; and the rights and liabilities, in relation to the Company, of the managing agent in any other capacity,

(c) *Graphite India Ltd. v. Dalpat Rai*, 1978-48 Comp. Cas. 683.

(d) For details, see Sec. 295.

shall not be affected. But Sec. 383-A inserted by the amending Act 41 of 1974 makes provision to the effect that every Company having a paid up share capital of Rs. 25,00,000/- or more shall have a whole-time Secretary and where the Board of Directors of any such company comprises only two directors neither of them shall be the Secretary of the Company. The English Companies Act (e) makes it compulsory for any company to have a Secretary. The complexities of modern business and the various laws which the management of a company are required to comply with, make reliance upon qualified Secretaries a common feature of medium-sized and big-sized companies. But as the Objects and Reasons of the 1974 amendment indicate, a compulsory provision like that in the U. K. Statute will involve a disproportionately heavy burden on the small-sized companies and so the minimum paid up share capital of Rs. 25,00,000/- is considered proper for being qualified for having a Secretary. A firm or a body corporate may be appointed by a Company as its Secretaries and Treasurers but they have no right to appoint a director of the Company. The Secretaries or Treasurers cannot also sell any goods or articles manufactured or produced by the Company or to purchase, acquire machinery, stores, goods or materials for the purposes of the Company unless authorised by the Board of Directors. In order to make provision for the regulation and development of the profession of Company Secretaries our Parliament has recently passed the Company Secretaries Act, 1980 and it received the assent of the President on 10th. December, 1980.

Sections 388-B and 388-C make provision for removal of managerial personnel from office by Central Government on the recommendation of the High Court. In order to avail of this provision the Central Government has to state a case in the form of application before the High Court making the offending party a respondent in the cause and the High Court will hold the inquiry and record its decision as to whether or not such respondent is a fit and proper person to hold the office of director or any other office connected with the conduct and management of the Company. The High Court may also pass an interim order restraining the respondent from discharging any of the duties of his office. Upon a final decision passed by the High Court the Central government, after giving a reasonable opportunity of showing cause, issue order removing a firm or body corporate from the Office of managing agents or Secretaries or Treasurers in pursuance of the decision of the High Court. This second show cause, after the findings and decision of the High Court appears superfluous inasmuch as the High Court will not record its finding without hearing the respondent.

Chapter V of Part VI deals with matters relating to Compromise, Arrangements, Reconstructions and Amalgamation. Sections 391 and 392 deal specifically with compromise and arrangements and the extent of the High Court's power in those matters. Though a large number of provisions of the

Compromises & Arrangements.

(e) See Sec. 177.

Act are in *pari materia* with the provisions of the Companies Act, 1948 of the U. K. there is no provision analogous to Sec. 392 in the U. K. Act. Sec. 391 of the 1956 Act provide that where a compromise or arrangement is proposed (a) between a Company and its creditors or any class of them, or (b) between a Company and its members or any class of them, the Court (generally the High Court according to Sec. 10 of the Act) may on application of the Company or any creditor or a member or of the liquidator (where the Company is being wound up) order a meeting of the creditors or members and where the majority representing 3/4th in value of the creditors or members agree to the compromise or arrangement, the Court may accord sanction to the same which will then be binding upon all creditors or members. In according sanction the Court must be satisfied, on affidavit or otherwise, as to the financial position of the Company and consider the auditor's report on the accounts of the Company. The Court will generally sanction the scheme if it is a fair (f). The order of the Court shall be filed with the Registrar otherwise it will be ineffective. Section 391 envisages a compromise or arrangement being proposed for consideration by members and/or creditors of a Company liable to be wound up under the Companies Act, 1956. Compromise or arrangement has to be between creditors and/or members of the Company and the Company, as the case may be. It is always open to the Company to offer a compromise to any of its creditors or enter into arrangement with each of the members. The Scheme when sanctioned by the Court does not merely operate as an agreement between the parties but has the statutory force and is binding on the Company as well as the dissenting creditors or members, dispensing with individual agreement with each of them(g). The purpose underlying Sec. 392 is to provide for effective working of the compromise or arrangement once it is sanctioned and over which the Court must exercise continuous supervision. Such supervision is necessary because over the period there may arise obstacles, difficulties and impediments and the Statute invests the High Court with powers to give appropriate directions for removal of those obstacles, difficulties and impediments and the Court can modify the provisions of the Scheme to the extent necessary for the smooth working of the compromise or arrangement. To effectuate this purpose the power of the widest amplitude has been conferred on the High Court, the only limitation being that all such directions and modifications in the Scheme must be for the proper working of the compromise and/or arrangement. Otherwise, the power is absolute and the Court can *suo moto* intervene and it is immaterial as to who drew the attention of the Court to a situation which necessitated the Court's intervention. The Court may, undoubtedly, decline to act at the instance of a busybody but if the action proposed to be taken is justified, valid, legal or called for, the capacity or credentials of the person who brought the situation calling for Court's intervention is hardly

(f) *Re. National Bank Ltd.* 1966-I. A. E. R. 1006.

(g) *See J. K. Private Ltd. v. New Kaiser I. Hind Spg. & Wvg. Co. Ltd.*, A. I. R. 1970 S. C. 1041.

relevant nor would it invalidate the resultant action only on that ground (h).

By the order sanctioning the compromise or arrangement or even by a subsequent order the Court may make provision for transfer of the whole or part of a Company or body corporate or undertaking and its properties or liabilities to a transferee Company; allot or apportion shares, debentures and policies. It may also order continuation by or against the Company of legal proceeding pending by or against the transferor Company; dissolution, without winding up of any transferor Company; provision for any person to dissent from such arrangement or compromise and make such incidental, consequential and supplemental provisions as are necessary to secure that the reconstructions or amalgamation shall be fully and effectively carried out. The Scheme for amalgamation shall not be sanctioned by the Court without considering a report from the Company Law Board or the Registrar that the affairs of the Company have not been conducted in any manner prejudicial to the interest of its member or the public interest. By the Court's order the transferee Company may acquire the share of the dissenting shareholders on the same terms as those applicable to consenting share-holders. The Central Government has also been invested with statutory power under Sec. 396 of the Act to amalgamate two or more Companies by its own order if it is satisfied that it is essential in the national interest that such amalgamation should be made. In certain circumstances compensation shall be given to a member or creditor who might suffer loss due to the amalgamation and the assessment of the compensation will be made by such authority as may be prescribed. It would be paid by the Company resulting from the amalgamation.

The terms Reconstruction and Amalgamation have not been defined. "Re-construction is generally interpreted as the transfer of assets and undertaking of a Company to a new Company formed specifically for the purpose of the acquisition because the existing objects and powers of the transferor company are no longer sufficient to meet new conditions. Amalgamation, on the other hand, arises when two or more companies join together to form a new company or where one company takes over the control of two or more companies by acquiring their shares" (g). The Court generally approves a scheme which it considers fair to the share-holders as a whole (h) but it would withhold its consent when the Scheme is found to have the effect of the majority share-holders expropriating the shares of a minority (i).

If the Court or the Central Government sanctions the Scheme for reconstruction or amalgamation for whatever reasons including that of public interest nothing in the memorandum or articles of association of the Company

(h) *S. K. Gupta v. K. P. Jain*, A. I. R. 1979 S. C. 734 and *Mansukhlal v. M. V. Shah* 1976—46 Comp. Case 279.

(g) Rankin & Spicer on Company Law.

(h) *Re. Grierson, Oldham and Adams Ltd.* 1967-I. A. E. R. 192.

(i) *Re Bugle Press Ltd.* 1961 Ch. 270.

will stand in the way. Sec. 376 of the Act provides that any condition in the memorandum or articles prohibiting reconstructions or amalgamations shall be void with effect from the commencement of the Act. But copies of every order made by the Central Government under Sec. 396 shall, as soon as may be after it has been made, be laid before both Houses of Parliament. On the question as to whether this provision of laying before the Parliament is directory or mandatory reference may be made to the discussion at pages 26 to 33 under Chapter 2.

Elaborate and effective provisions have been made in Chapter VI of this Part of the Companies Act, 1956 for prevention and removal of oppression and mismanagement in the affairs of a Company. Sec. 397 confers right upon the members of a Company to apply to the Court for relief under Sec. 402 of the Act or for other appropriate reliefs if the affairs of the Company are found to be so conducted as to cause oppression to any member or members of the Company. The applicant must however comply with the requirements provided in Sec. 399 before making such application. Even the Central Government, if it considers just and equitable in the circumstances of the case, may authorise any member to apply to the Court under Sec. 397 or 398 for the purpose. It does not define 'oppression' and it is left to the Court to decide it on the facts of each case if there is oppression. The conduct complained of must be a continuous conduct of the majority share-holders perpetrated in a manner oppressive to a part of the members. It must be conduct which is harsh, burdensome and wrongful and lacking in probity and fair dealing to a member in respect of the proprietary rights of a share-holder (j). A continued interference by the majority shareholders disregarding the wishes of other share-holders (k) or as Lord Denning put it 'the affairs of a Company can be conducted *oppressively* by the directors doing nothing to defend its interest when they ought to do something (l). But unwise, inefficient or careless performance of duties by managing directors will not be considered to be oppressive conduct (m). When, however, a majority of share-holders make a petition for relief complaining wrongful and *ultra vires* acts of minority and it is found that the Company's interest is seriously prejudiced, the Court is competent to make appropriate orders at the instance of the majority (n). Conversely, when the right of a share-holder to appoint a Director is infringed he alone can make an application as his right qua-share-holder is affected and this can very well be the basis for a petition under Sec. 397 and 398 (o). The rule in the English Case *Foss v. Harbottle* (p) will not apply to such cases and the

(j) *Shanti Prosad Jain v. Kalinga Tubes*, A. I. R. 1965 S. C. 1535.

(k) *Re. H. R. Harmer Ltd.*, 1959—I WLR 62.

(l) *Scottish Co-Operative Wholesale Society Ltd. v. Meyer*. (1959) A. C. 324.

(m) *Re Eive Minute Car Wash Service Ltd.* 1966—I A. E. R. 242.

(n) *In Re. Sindhri Iron Foundry* 1964 Comp. Case 510.

(o) *Albert David*, *In Re.* 68 C. W. N. 163.

(p) 1843, 2 Hare 461.

minority can bring action to restrain a Company from doing illegal acts or acts which are *ultra vires* or to prevent it from persisting in oppressive conduct. Sec 403 enable the Court to make interim orders for regulating the conduct of the Company's affairs upon such terms and conditions as appear to it to be just and equitable. The Court may even direct alteration in the memorandum or articles of a Company to prevent oppression and mismanagement and the Company shall not alter the same making it inconsistent with the orders of the Court and without leave of the Court and the alterations ordered by the Court shall have the same effect as if made by the Company itself.

Besides these powers of the Court, the Central Government has the statutory powers under Secs. 408 and 409 of the Act to appoint a number of directors, even *suo moto*, to effectively safeguard the interests of a Company and in order to prevent the affairs of a company being conducted either in a manner which is oppressive to any member of the Company or in a manner which is prejudicial to the interests of the company or to public interest. Such persons may be appointed as directors or additional directors and the Central Government would be competent to issue such directions to the company as it may consider necessary or appropriate in regard to its affairs. The Government nominated directors will report to the Central Government from time to time with regard to the affairs of the Company. This provision in the law, introduced by the 1974 amendment makes the appointment of directors purposeful and effective and enables the nominated directors effectively discharge their responsibilities in the light of the objectives for which their appointments are made. They will keep the Government informed about the affairs of the Company so that the Government may keep its watchful eye upon the Company. The Central Government can also stop any change in the Board of Directors of the Company if it considers such change has the possibility of prejudicially affecting the affairs of the Company (q).

The winding up of a Company may be either (a) by the Court, or (b) voluntary, or (c) subject to the supervision of the Court. The subject of winding up is dealt with in Part VI of the Statute ^{Winding up} making elaborate substantive and procedural details relating to the matter. In all cases of winding up, every present and past member shall be liable to contribute to the assets of the Company to an amount sufficient for the payment of its debts and liabilities as also of the costs, charges and expenses of the winding up. A contributory would include the holders of any fully paid up shares and when a contributory dies his legal representatives shall be liable in the due course of the administration to contribute to the assets of the Company in discharge of his liability. The assignee of an insolvent and the liquidator of a body corporate will similarly represent the contributory of those categories.

Sec. 433 mentions the circumstances in which a Company may be wound

(q) See Sec. 409.

up by the Court before which application for the winding up shall be filed subject to the provisions contained in Sec. 439, by a Company, by any creditor or creditors, or by a contributory or by all or any one of the above three categories or by the Registrar or even by the Central Government in a case falling under Section 243. In the last mentioned case the Central Government may not only make such an application but also cause one to be made by an authorised person and along with the petition for winding up the Government may also apply under Sections 397 and 398 for reliefs against oppression and mismanagement. Where a company is being wound up voluntarily or subject to the supervision of the Court, the application may be presented by (a) any person authorised to do so under Section 439 or (b) by the Official Liquidator. Where, before presentation of any petition for winding up a Company passes a resolution for winding up, the time of passing the resolution shall be deemed to be the moment when the winding up commenced.

Sec. 443 lays down the powers of the Court on hearing petition for winding up and when the Court allows the petition the Court shall forthwith cause intimation thereof to be sent to the Official Liquidator and the Registrar. Before the petition is taken up for hearing it must be advertised according to the Rules framed under the Act. But the Court has the jurisdiction to suspend publication of the advertisement. This power the Court has and any contrary view would make the Court an instrument of harassment and even of blackmail. This is so because once a petition for winding up is advertised the business of the Company is bound to suffer serious loss and injury (r). In England, on the same analogy, the Court may restrain presentation of a petition if it is of the opinion that the proceedings are vexatious or it is an abuse of the process of the Court (s).

Hearing of petition

But when a winding up order is made or the Official Liquidator has been made a provisional liquidator no suit or legal proceedings shall be commenced or proceeded with against the Company except with the leave of the Court and upon such terms as the Court will impose, and the winding up order shall operate in favour of all the creditors and contributions of the Company. The Official Liquidator ultimately becomes the Liquidator of the Company upon the making of the winding up order and to him shall be submitted a statement of the affairs of the Company with details as mentioned in Sec. 454 by the directors and the Manager, Secretary or other Chief Officer of the Company. The Liquidator shall thoroughly consider the statement and submit first a preliminary report to the Court. The Central Government shall keep watch over the conduct of the liquidator and if necessary move the Court for replacing a particular liquidator. The Court may also appoint a Committee of inspection to act with the liquidator and such Committee shall comprise of not more than twelve members selected out of the creditors and contributors of the Company.

(r) *National Conduits v. S. S. S. Arora*, A.I.R. 1968 S. C. 279.

(s) *Charles Forte Investment Ltd. v. Ananda*, 1964 Ch. 240.

Sec. 478 makes provision for public examination of promoters, directors, etc., by the Court if the report of the liquidator discloses that a fraud has been committed by such persons. This public examination is intended to collect evidence to decide as to whether there was any act or omission which resulted in loss of the Company. It is not an accusation and so this provision for public examination does not offend Article 20(3) of the Constitutions (t). It is similar to the object contained in Sec. 45-G of the Banking Companies Act.

Procedure for voluntary winding up is dealt with in Sections 484 to 520 of the Act. Besides, after a Company has passed a resolution for voluntary winding up the Court may make an order that the voluntary winding up shall continue subject to supervision of the Court (u) and a petition for the continuance of a voluntary winding up subject to the supervision of the Court shall, for the purpose of giving jurisdiction to the Court over suits and legal proceedings, be deemed to be a petition for winding up by the Court (v). In such cases, the liquidator shall exercise all his powers without the sanction or intervention of the Court but shall be deemed to be conducting the winding up subject to the supervision of the Court.

When the winding up, in any of the manner aforesaid is complete, the Company shall stand dissolved. This aspect of dissolution is covered by Sections 481, 498, 509 and 527 of the Act. The effect of the dissolution is that the share-holders or creditors of the dissolved Company cannot maintain any action for recovery of the assets of the Company. In our country the winding up precedes the dissolution and there is no statutory provision for vesting the properties of a dissolved company in a trust nor does the law recognise the share-holders or creditors as heirs of the dissolved Company. Therefore whatever properties are left upon dissolution they vest in the Government (w).

But if within two years of the dissolution an application is made by the liquidator or any person interested in the Company makes an application to the Court it may declare the dissolution as void and it shall be the duty of the applicant to file a Certified Copy of the order with the Registrar who shall register the same (x). Certain duties are cast upon the Registrar to communicate with the Company and publish notice in the Official Gazette and if he ultimately finds that the Company is not carrying on business the Registrar will strike the name of the defunct company off the Register and notify accordingly in the Official Gazette (y).

(t) *Joseph Augusthi v. Narayanan*, A.I.R 1964 S. C. 1552.

(u) Sec. Sec. 522.

(v) See. Sec. 523.

(w) *Pierce Leslie & Co. Ltd. v. Miss Violet*, A. I. R 1969 S. C. 559.

(x) Sec. Sec. 559.

(y) See Sec. 560.

Relevant to this topic would be the winding up of unregistered companies. A Company is an unregistered Company if it is not registered under the Act of 1956 or under the previous Company law or is a railway company incorporated by an Act of Parliament of India or of the United Kingdom.

Unregistered Companies

An unregistered Company would therefore include any partnership, association or company consisting of more than seven members at the time the petition for winding up is presented to the Court. But no unregistered Company shall be wound up under this Act voluntarily or subject to the supervision of the Court. Where a body corporate incorporated outside India which has been carrying on business in India, it may be wound up as an unregistered Company notwithstanding that the body corporate has been dissolved or otherwise ceased to exist as such under or by virtue of the laws of the country under which it was incorporated.

Companies incorporated outside India which, after the commencement of the Companies Act, 1956, have established a place of business within India and Companies incorporated outside India which have, before the commencement of this Act, established a place of business within India and continue to have an established place of business within India at the commencement of the Act of 1956, are called Foreign Companies. Until February 1, 1975 the provisions of the 1956 Act had no general application to foreign companies operating in India. They were merely required to file documents of incorporation in the Courts of origin and those specifying the agent of the Company stationed in India for service of notices etc. and to submit audited accounts to the Registrar, every year. Excepting these there was no other regulatory provision to check the operations and activities of the foreign companies in India. To remove these lacunae there was amendment of the Companies Act, 1956 in the year 1974 and as the Statement of 'Objects and Reasons' of the 1974 Amendment indicates the regulatory provisions in the 1956 Act were extended to foreign companies and it was proposed that in respect of such companies in which more than 50 per cent of the share capital is held by Indian Citizens or bodies corporate incorporated in India, such other provisions of the Act as may be notified by the Central Government will become applicable to the extent specified in the notification. Accordingly Sections 592 to 602 of the Act have been made applicable to the Foreign Companies and Section 591(2) as amended in 1974 lays down that where not less than 50 per cent of the share capital of a foreign company is held by one or more citizens of India or one or more bodies corporate incorporated in India, whether singly or in the aggregate such company shall comply with such provisions of the Companies Act, 1956 as may be prescribed with regard to the business carried on by it in India, *as if it were a Company incorporated in India*. Part XI of the Act, with all its details applies to Foreign Companies and further elaboration is unnecessary in these lectures.

A Government Company means any Company in which not less than

51 per cent of the paid up capital is held by the Central Government or by any State Government or Governments or partly by the Central Government and partly by one or more State Governments and includes a Company which is a subsidiary of a Government Company as thus defined (z). The auditor of a Government Company shall be appointed by the Central Government on the advice of the Comptroller and Auditor-General of India and the latter shall have power to direct the manner in which the Company's accounts shall be audited. Where an auditor of two Government Companies held an office of profit he was, as such, disqualified for being chosen as a member of Parliament (a).

A public corporation, though owned by the Government is not a department of the Government. It is a separate legal entity and its employees are not entitled to the protection of Article 311 of the Constitution (b) and those employees get the same deal as employees of other industrial establishments under the Industrial Disputes Act (c) and the Government Company, incorporated as it is under the Companies Act no public duty has been imposed upon it. As such no writ of mandamus lies against the Government Company (d). As already pointed out a public or Government Company is not a department of the Government and even though the President of India holds all its shares, the Company is neither an agent of the President or of the Central Government nor is it a servant of the State in spite of the fact that a minister appoints its directors. The Company performs commercial functions and not governmental functions (e). Similar would be the position in respect of a Government undertaking. 'Undertaking' means the entire organisation, i.e., the entire business of the going concern (f). An illuminating discussion on some important aspects of the Company law will appear from the recent Supreme Court judgment in the *Needle Industries* case (g).

(z) See Sec. 617.

(a) *Guru Govinda Basu v. Sankari Prosad Ghosal*, A. I. R. 1964 S. C. 254.

(b) *S. L. Agarwal v. Hindusthan Steel Ltd.*, A. I. R. 1970 S. C. 1150.

(c) *Hindustan Antibiotics Ltd., v. Workmen*, A. I. R. 1967 S. C. 948.

(d) *Praga Tools Corporation v. C. V. Immanuel*, A. I. R. 1969 S. C. 1306.

(e) *Heavy Engineering Mazdoor Union v. State of Bihar*, A. I. R. 1970 S. C. 82.

(f) *R. C. Cooper v. Union of India*, A. I. R. 1970 S. C. 564.

(g) *Needle Industries v. Needle Industries*, A. I. R. 1981 S. C. 1298.

COMPANIES—CITIZEN OR STATE

I close this series of lectures by a reference to a topic which has been exercising the minds of Judges and Jurists—the question as to whether a Company or as a matter of fact a Corporation is a citizen or whether it is a State and the circumstances under which it is neither. In an earlier lecture we have seen what a citizen means. A group of citizens forming a Company or a Corporation does not make that corporate body a citizen. A company incorporated under the Companies Act is not created by the Companies Act either. It only comes into existence in accordance with the provisions of the Act. Such a Company is not a statutory body because it is not created by the Statute. A company thus coming into existence may not have any statutory or public duty imposed upon it. There is a well-marked distinction between a body which is created by the Statute and a body which after having come into existence is governed in accordance with the provisions of the Statutes.

Companies or Corporations have nationality in accordance with the country of their incorporation for the purpose of international law but that will not make them citizens of that country for the purpose of the municipal law or of the Constitution.

Sholapur Spinning
Case-No. 1

A share-holder of the Sholapur Spinning and Weaving Company had made an application under Art. 32 of the Constitution before the Supreme Court for a declaration that the Act impugned in that case was void as also for the enforcement of his fundamental rights by a writ of mandamus against the Government and the directors of the company, restraining them from exercising any power under the Act. The application was opposed by the company and in dismissing the application Mukherjea J. observed:

The fundamental rights guaranteed by the Constitution are available not merely to individual citizens but to corporate bodies as well except where the language of the provision or the nature of the right compels the inference that they are applicable only to natural persons. An incorporated company, therefore, can come up to this Court for enforcement of its fundamental rights (a).

The above observation was later considered to be an *obiter* as the Court was not dealing with any application by the Company. Similarly, in what is known as the second *Sholapur* case the Supreme Court was dealing with a matter arising out of a suit instituted by a preference shareholder, in a representative capacity on behalf of himself and other such share-holders of

(a) *Chiranjit Lal v. Union of India*. A. I. R. 1951 S. C. 41; (1950) 1. S. C. R. 869.

that company for a declaration that the law which had been impugned in the previous case was *ultra vires*. That law was an Ordinance promulgated by the Governor-General of India on January 9, 1950 and subsequently repealed and followed by an Act passed on 7th April 1950 by the Parliament almost in identical terms and known as the Sholapur Spinning and Weaving Company (Emergency Provisions) Act. The Supreme Court held that the enactment had authorised, in effect, the deprivation of property of the company within the meaning of Art. 31 of the Constitution, without compensation and had thus violated the fundamental rights of the company under Art. 31(2) of the Constitution (b). The two cases just noted were at the instance of shareholders and not by the company concerned. The Bengal Immunity Company of Calcutta, had, however, made an application under Art. 226 of the Constitution against the State of Bihar and preferred an appeal before the Supreme Court against the decision of the High Court for certain reliefs against the provisions of the Bihar Sales Tax Act. The Court granted relief to the company but left open the question as to whether the company as such could enforce any of the fundamental rights (c).

Sholapur Spinning
Case-No. 2.

All these cases were later considered by a Special Bench of the Supreme Court to which one of the questions referred was—whether the State Trading Corporation, a company registered under the Indian Companies Act, 1956, is a citizen within the meaning of Art. 19 of the Constitution and whether it can ask for the enforcement of fundamental rights granted to citizens under the said Article? That was in the matter of an application under

State Trading
Corpn.

Art. 32 of the Constitution made by the company and one K. B. Lal, the then Additional Secretary in the Ministry of Commerce and Industry, Government of India, for quashing, by a writ of *certiorari* or any other appropriate writ, direction or order, certain proceedings relating to assessment of sales tax instituted by or under the authority of the respondents the Commercial Tax Officer & Ors. (d). The majority judgment of the Court answered the question in the negative. It said that nationality has reference to the jural relationship which may arise for consideration under international law. Citizenship has reference to jural relationship under the municipal law. In other words, nationality determines the civil rights of a person, natural or artificial, particularly with reference to international law, whereas citizenship is intimately connected with civic rights under municipal law. Hence, all citizens are nationals of a particular State, but all nationals may not be citizens of the State. In other words, citizens are those persons who have full political rights as distinguished from nationals, who may not enjoy full political rights and are still domiciled in that country. The Court

Citizens and
Nationals

(b) *Dwarka Das v. Sholapur Spinning Co.* (1954) S. C. R. 674.

(c) *Bengal Immunity Co. v. State of Bihar* (1955) 2 S. C. R. 603.

(d) *State Trading Corpn. of India Ltd. v. Commercial Tax Officer* A. I. R. 1963 S. C. 1811, (1964) 4 S. C. R. 99.

further held that when the Constitution laid down the freedoms contained in Art. 19 as available to all citizens it deliberately kept out all non-citizens and in that context non-citizens would include aliens and artificial persons and so the company was not entitled to enforce any of the fundamental rights provided in the Constitution. In his dissenting and minority judgment Das Gupta J. had, however, expressed the opinion that the State Trading Corporation was entitled to the fundamental rights as a citizen of India. The learned judge sought to equate a domestic corporation to a natural person and that too through the fiction of 'piercing or tearing the veil' of a corporate body like a company. That theory is adopted in the United States of America though the U. S. A. holds the view that Corporation is an artificial person and not a Citizen. Our Constitution differs from that of the U. S. A. and so in India the Courts did not agree to pierce the veil of a corporation composed of Indian citizens in order to enable it to enforce or seek relief on the basis of fundamental rights under Art. 19(e). To do otherwise would be to allow things to be done indirectly what could not be done directly. Share-holders as independent litigants could be given relief apart from the corporation. In the *Bank Nationalisation* case (f) the Supreme Court said: Jurisdiction of the Court to grant relief cannot be denied, when by

Impairing of
Shareholders rights.

State action the rights of the individual shareholders are impaired, if that action impairs the rights of the corporation as well. The test in determining whether

the shareholders' rights are impaired is not formal. It is essential and qualitative. If the State action impairs the rights of the shareholders as well as of the Company, the Court will not, concentrating merely upon the technical operation of the action, deny itself jurisdiction to grant relief." *Bennett Coleman's* case (g) went a step further and held that a company may join its shareholders where the latter seek to enforce fundamental rights and the Court will not turn down such application. In other words a Corporate body can challenge constitutionality of any law infringing fundamental rights through its shareholders.

The position, therefore, is that though the expectations of the Judiciary that Parliament would come forward to amend Part II of the Constitution to widen the scope and meaning of the term 'citizen' and citizenship so that nationality and citizenship could be made interchangeable terms failed to

Piercing the veil.

materialise, the Courts, in course of a quarter of a century of the coming into effect of the Constitution

did not consider itself hide-bound and incompetent to grant relief to the corporate bodies where matters related to the infringement of fundamental rights under Art. 19 of the Constitution without taking resort to the USA

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- (e) *Tata Engineering Co. v. State of Bihar*, A. I. R. 1965 S. C. 40; *B. I. S. N. Co. v. Jasgit*, A. I. R. 1964, S. C. 1441; *Barium Chemicals v. Company Law Board* A.I.R. 1967, S. C. 295; *Agarwal v. Hindusthan Steel Co.* A. I. R. 1970, S. C. 1150.
- (f) *R. C. Cooper. v. Union of India*, A. I. R. 1970, S. C. 564.
- (g) *Bennett Coleman v. Union of India* A. I. R. 1973 S. C. 106; *Divisional Forest Officer v. Biswanath Tea Co. Ltd.*, A. I. R. 1981 S. C. 1368.

theory of piercing the veil of the Corporate body which continues to remain an artificial person and a non-citizen. Similarly, Clubs or Societies as such are not entitled to ask for writs they being not citizens (h). A company registered under the Companies Act is not a statutory body and so there cannot lie any writ petition against such a company. Under certain circumstances a suit may lie but not a writ for breach of statutory duty. There is no difference so far as writ proceedings are concerned between such a case and the case where the proposed respondent is a company registered under the Companies Act or a Society registered under the Co-operative Societies Act or the Societies Registration Act even if there is a breach of any statutory duty (i). Again company or a corporation incorporated under the provisions of the Indian Companies Act, 1956, may be a Private Limited Company or a Public Limited Company or a Government Company as defined in Sec. 617 of the Act. A Corporation brought into existence by a statute is generally referred to as a statutory Corporation. A Corporation or a Company—which are indeed interchangeable terms—is a juristic entity, and a legal person. It has a distinct juristic personality of its own. It can own property, enter into contracts and do all other things which an ordinary individual can. As we have already seen a Corporation is a distinct legal entity from its shareholders, who may be individuals or may themselves be legal persons. But this does not mean that a Corporation cannot be or cannot become an instrument or agent of another.

Instrument or
Agent of another.

Just as an individual does not cease to be an individual by acting as an agent of another, so a Corporation does not lose its identity or distinct personality by being or acting as an instrumentality or agency of another; but in such a case, its function or activity is relatable to the master or the principal, as the case may be. Creation of such Corporations by the Government is the order of the day. They are being created either by a statute or incorporated under the Companies Act. They are designed to promote efficiency by ridding them of the deadening grip of governmental red-tape and by introducing business principles and methodology in their working. Large segments of activity, which were hitherto being carried on by the State are now being diverted to such Corporations. To-day, these mushrooming Corporations span the entire national economy, from electricity, transport trading in food-grains and other essential goods, to banking, hotels, tourism, defence production, coal and steel production, and so on. Probably, they employ as many employees as the Governments themselves do. Many of these Corporations are more powerful than many local authorities. Indeed, the employees of these Corporations are now included within the definition of public servant in Sec. 21 of the Indian Penal Code and are thus afforded certain protections. The citizens have to deal with these Corporations, in their every day life, as much as they have to with the Government. The

(h) *Janata Recreation Centre v. State*, A. I. R. 1979 A. P. 265.

(i) *Electrogears (P) Ltd. v. Rehabilitation Industries Corporation*. A. I. R. 1979 Cal. 320.

question, therefore, arises, how far these Corporations are answerable to the Constitution and in particular to the citizens' rights enshrined in Part III—or as a matter of that, Part IV? In other words, are they mere private bodies, or do they partake of the character of the State? Are they authorities within the meaning of Art. 12 of the Constitution and if so, when do they become one? If they are not authorities within the meaning of Art. 12, then how are they answerable to, and subject to Part III? Are they to be treated as instrumentalities and agencies of the State and their activity as State action? If so, again, what are the tests to determine and what is the meaning of State action?

Now let us read Art. 12, which says:

In this part, unless the context otherwise requires, the State includes the Government and Parliament of India, and the Government and Legislature of each of the States, and all local or other authorities within the territory of India or under the control of the Government of India.

Art. 30 appearing in Part IV says that in that part, unless the context otherwise requires "the State" has the same meaning as in Part III.

An Insurance Company doing general insurance business is not a State or such authority. Even when two or more companies registered under the Companies Act merge together, the amalgamated Company does not in any way lose its original corporate character. The only legal result is that the amalgamated Companies lose their identity, while the Company in which they are amalgamated retains its original character. The merger of a number of Companies under the Companies Act would not make the resultant Company to be either a State under Art. 12 of the Constitution or a Statutory Corporation created by the Statute itself (j).

Merger of
Companies.

It is necessary to recall that the Life Insurance business within the country was nationalised much earlier and in its wake came the Life Insurance Act of the year 1956. However, at that stage the general insurance business was allowed to continue in private hands, though it is also manifest that the Life Insurance Corporation itself had also carried on a substantial general insurance business as well. On a policy decision having been taken by the Government to nationalise the general insurance business also, the General Insurance (Emergency Provisions) Ordinance, 1971 was enacted. This was later followed by an Act of Parliament being the General Insurance (Emergency Provisions) Act, 1971, which was passed with the avowed object of protecting the interests of the policy holders, pending the nationalisation of the general insurance business and to be expedient in public interest. Then followed the primary statute, namely, the General Insurance Business (Nationalisation) Act of 1972.

Nationalisation of
Insurance Business.

(j) *M. L. Mohria v. G. I. Corporation of India*, A. I. R 1979 P. & H. 183.

The background and the broad scheme of nationalisation emanating from the aforesaid three statutory provisions seems to be that the shares in the existing Insurance Companies carrying on the general insurance business were automatically transferred to and vested in the Central Government on the appointed day. The statement of objects and reasons of the 1972 Act made it explicit that on the appointed day the shares in the existing insurance companies carrying on general insurance business would automatically stand transferred to and vested in the Central Government. The Act also provided for the framing of one or more schemes whereby the numerous Indian Insurance Companies would get merged in one or another so that ultimately there would be only four Indian Insurance Companies so constituted as to promote competition between them in order to render effective service in the field of general insurance in all parts of India. It was expressly envisaged that a Government Company called the General Insurance Corporation of India would be entrusted with the task of supervising, controlling and carrying on the business of general insurance. On the formation of this Corporation all shares of Indian Insurance Companies, which had earlier been vested in the Central Government, would stand automatically transferred to the Corporation and the remaining Indian Insurance Companies would become subsidiaries to the said Corporation.

Effect of
Nationalisation

Any constitutional authority or statutory body vested with powers and carrying on business of public importance and which is fundamental to the life of the people could be considered as "State" within the meaning of Article 12. Whenever there is a statutory body or authority, the constitution of which shows that it is the voice and hand of Government which is felt in a large measure and where the Corporation deals with business of public importance or vital to the life of the community, it will be safe to infer that such a Corporation would fall within the expression "other authority" under Article 12 of the Constitution (k).

Business of public
importance.

A Managing Committee of a school is not an authority or agency of the Government and accordingly no application for a writ lies against it (l) but the Board of High School and Intermediate Examination cancelling the examination exercises quasi-judicial functions and, therefore, principles of natural justice, though to some minds burdensome, must be followed (m). Where, therefore, there was no inquiry by any tribunal or any officer of the University or by any authority whatsoever and no charge was given to the students whose examination was cancelled on the simple allegation that there was mass copying at the Centre and the students' representations

Education Boards
and Universities.

(k) *Sukdev Singh v. Bhagatram*, A. I. R. 1975 S. C. 1331.

(l) *In re, Badri Narayan Thakur*, 85 C. W. N. 491.

(m) *Board of High School v. Kumari Chitra Srivastava*, A. I. R. 1970 S. C. 1039.

were not replied to by the University, the order cancelling the examination is *ultra vires* and cannot be sustained (n).

Though the expression 'local authority' is defined in the General Clauses Act, 1897, the other expressions namely 'State' and 'other authorities' have not been defined either in the Act of 1897 or in the Constitution itself. It is left to the Judiciary to find out the content and meaning of expressions. In its voyage on the discovery of their meaning the Supreme Court settled first the status of the Judiciary itself and held that the Judiciary was included in the definition of State (o) but at the same time the Court cautioned that the words 'other authorities' should not be construed *ejusdem generis* (p).

Quasi-Governmental powers.

Rather the dictionary meaning should be preferred as Bhargava J. said, it is wide enough to include a public administrative agency or Corporation having quasi-governmental powers and authorised to administer a revenue-paying public enterprise and all bodies created by a statute on which powers are conferred to carry out Governmental or Quasi-Governmental functions. Shah J. in the same case, however, narrowed down the cast of the net to some extent and said the authorities, constitutional or statutory, invested with power by law not sharing the sovereign power i.e., power to make rules or regulations and to administer or enforce them to the detriment of citizens and others do not fall within the definition of the 'State' in Art. 12 of the Constitution(q). As a matter of fact that was the first case before the Supreme Court on the subject and the gates started opening and the year was 1967, two decades after independence.

The absence of this sovereign power in the *Praga Tools Corporation* led the Supreme Court to hold, in 1969, that it was not a governmental Corporation or an industry run by or under the authority of the Union Government though the latter was the largest shareholder. The deciding

A cautious approach

factor in this case was that the Corporation was a Company registered under the Companies Act, 1956 and so was governed by the provisions of that Act and therefore a separate legal entity. The Corporation was therefore not a 'State' or 'other authority' within the meaning of Art. 12 of the Constitution (r) and similar would be the position of an industry which carries on its business under its own Memorandum and Articles of Association (s). A very cautious approach again, keeping in view the dictum of Shah J. expressed in the case of the Electricity Board (t). Similar was the decision in *S. L. Agarwal v. Hindustan Steel Ltd.* (u) where the employees of Hindustan

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- (n) *C. M. Yasin v. Registrar, Calcutta University*, 82 C. W. N. 480.
 (o) *Naresh v. State of Maharashtra*, A. I. R. 1967 S. C. 1.
 (p) *Electricity Board v. Mahanlal*, A. I. R. 1967 S. C. 1857.
 (q) *Electricity Board*, *ibid.*
 (r) *Praga Tools Corporation v. C. V. Immanuel*, A. I. R. 1969 S. C. 1306.
 (s) *Heavy Engineering v. State of Bihar*, A. I. R. 1970 S. C. 82.
 (t) *Electricity Board*, *ibid.*
 (u) A. I. R. 1970 S. C. 1150.

Steel Ltd. were held to be not entitled to the protection of Art. 311 of the Constitution as it was a company registered under the Companies Act, 1956. In similar strain were the decisions of the Supreme Court in two more cases though the Corporate bodies there had framed Regulations, under the Statute, detailing the conditions of service of the persons employed by them with the result that termination of the services of some of their employees in violation of those Regulations were not declared void and reinstatement was refused (v).

That was the position till 1971. In the decade that followed and till this day there has been a tremendous development in this branch of the law and a definite and a decisive step forward has been taken by the highest judiciary of the country. We start with the case of the Oil and Natural Gas Commission in which the Supreme Court was also called upon to examine and find out the status of similar institutions like the Life Insurance Corporation and the Industrial Finance Corporation (w). What we find here is that the majority of the learned Judges including Ray C.J. applied the twin tests propounded in 1967 in the Electricity Board's case (x) and held that the above Commission was owned by the Government and it was a statutory body and not a company. So was the Life Insurance Corporation in which the life insurance business was vested after nationalisation. Similarly, the Industrial Finance Corporation was under the complete control and management of the Central Governments. All these institutions were managed by the Government and they could be dissolved by the Government alone. The Bench found that these corporate bodies satisfied the twin tests mentioned above and accordingly held that these came within the meaning of State under Art. 12 of the Constitution. Therefore the Rules and Regulations made by those bodies under their respective statutes were as much binding upon them as upon their employees and the Corporations were obliged to observe the principles of natural justice in dealing with their employees. Definitely, a big step forward!

But the *Council of Scientific and Industrial Research* which is a society registered under the Societies Registration Act and of which the Prime Minister is the *ex-officio* President and the governing body is composed of officers of the Central Government who are appointed and terminated by the Central Government, was not considered by the Supreme Court as State under Art. 12. That case arose out of a complaint by an employee of the Council for violation of Arts. 14 and 16 of the Constitution but he could get no relief as the Council did not come within the scope of Art 12 because it was said that it did not have a statutory character and it being a separate juristic entity the Council could not be called an agency or instrumentality of the State(y). This decision, however,

(v) *U. P. State Warehousing Corporation v. C. K. Tyagi*, A. I. R. 1970 S. C. 1244; *Indian Airlines v. Sukhdeo Rai*, A. I. R. 1971 S. C. 1826.

(w) *Sukdev Singh v. Bhagatram*, A. I. R. 1975 S. C. 1331.

(x) A. I. R. 1967 S. C. 1857.

(y) *Sabhajit Tewary v. Union of India*, A. I. R. 1975 S. C. 1329

did not lay down any principle or test for the purpose of determining when a Corporation could be said to be an authority, the only conclusion, apparently, being that the Council was not an agency of the Government and was, therefore, not an authority within the meaning of Art. 12.

We, however, find an important breakthrough in a later case (z) where the Supreme Court after referring to the earlier cases pointed out that the ratio of these decisions was that to be 'other authorities' the institutions concerned must be invested with Statutory power to issue binding directions to third parties, the disobedience of which would entail penal consequences or they must have sovereign power to make rules and regulations having the force of law. If a statutory Corporation or body or authority is an agency or instrumentality of the Government it would be an 'authority' and so a State.

Where there is an element of public employment or service or support by statute or something in the nature of public office or status, the Court would correct illegal acts. In other words, writ could and should issue to such a body if illegality were established. And what is a public office? Ferries in his *Extraordinary Legal Remedies* says:

"A public office is the right, authority and duty created and conferred by law, by which an individual is vested with some portion of the sovereign functions of the Government to be exercised by him for the benefit of the public, for the term and the tenure prescribed by law. It implies a delegation of a portion of the sovereign power. It is a trust

Public Office—meaning of.	conferred by public authority for a public purpose, embracing the ideas of tenure, duration, emoluments and duties. A public officer is thus to
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be distinguished from a mere employment or agency resting on contract, to which such powers and functions are not attached. The Common Law Rule is that in order for the *writ* to lie, the office must be of a public nature. The determining factor, the test, is whether the office involves a delegation of some of the solemn functions of Government, either executive, legislative or judicial, to be exercised by the holder for the public benefit. Unless his powers are of this nature he is not a public officer. As one authority puts it, the tests to be applied in determining whether an information will lie, are the source of the office, which should be from the sovereign authority, the tenure which should be fixed and published; and the duties which should be of a public nature."

To be precise we may refer to the principles culled out by Krishna Iyer, J., from the judgment in *Ramana's* case (Supra) for determining whether a Corporation is an instrumentality or agency of the State. They are:

"1. One thing is clear that if the entire share capital of the corporation is held by Government, it would go a long way towards indicating that the Corporation is an instrumentality or agency of Government.

(z) *Ramana v. International Airport Authority of India*, A. I. R. 1979 S. C. 1628; *U. P. Warehousing Corporation v. V. N. Vajpayee*, A. I. R. 1980 S. C. 840.

2. Existence of “deep and pervasive State control” may afford an indication that the Corporation is a State agency or instrumentality.

3. It may also be a relevant factor whether the Corporation enjoys monopoly status which is State-conferred or State-protected.

4. If the functions of the Corporation are of public importance and closely related to governmental functions, it should be a relevant factor in classifying the corporation as an instrumentality or agency of Government.

5. Specifically, if a department of Government is transferred to a Corporation, it would be a strong factor supportive of this inference of the Corporation being an instrumentality or agency of Government. So the *Bharat Petroleum Corporation* was held to be a ‘State’ within the enlarged meaning of Art. 12 and the Supreme Court wanted us to eschew such sophisticated considerations as the legal person must be a statutory Corporation or must have power to make laws or must be created by and not under a Statute (a).

A Full Bench of the Andhra Pradesh High Court (b) while adopting these tests very correctly added the following few principles by way of clarification, which really emerge from the above decisions and logically flow from them; (i) in applying the above tests, it is not very much relevant whether the Corporation is created by a statute or is incorporated under a statute; e.g., Companies Act, Societies Registration Act, etc. The fact that a Corporation is a statutory Corporation may perhaps be a factor supporting the conclusion of the Corporation being an instrumentality or agency of the State; but, it does not follow that every statutory Corporation is *ipso facto* an instrumentality or agency of the State. Similarly, every Government Company (see its definition in Section 617 of the Indian Companies Act) cannot be called an instrumentality or agency of the State. Again the above tests have to be applied; (ii) it is not necessary that all the tests pointed out above should be satisfied. It would be a question to be determined in a given case on an aggregate of the relevant circumstances. For instance, if a Corporation is created and the functions of an existing department of the Government are transferred to it, it would no doubt be a strong factor supporting the conclusion of the Corporation being an instrumentality or agency of the Government; but what difference would it make if instead of doing that, the State creates a Corporation by contributing its total share-capital, by retaining total control over it, and by calling upon such Corporation to undertake a fresh activity of a public nature and for the benefit of the public? (iii) If a Corporation is vested by law with power to give directions, the disobedience of which is punishable as a criminal offence or is invested with the power to make Rules and Regulations and to administer or enforce them to the detriment of the citizens and others, they would by themselves be “authorities within the territory of India” within the meaning of Art. 12. In such cases,

Aggregate of relevant circumstances.

(a) *Som Prakash v. Union of India*, A. I. R. 1981 S. C. 212.

(b) *B. Satyanarayana v. State*, A. I. R. 1981 A. P. 125 (FB).

the further test whether they are instrumentalities or agencies of the Central or State Government is unnecessary. They may be or may not be. This test becomes relevant in case of Corporation—statutory or otherwise—which are not clothed with the powers aforesaid, and which therefore can be brought within the purview of definition only by treating them as instrumentalities or agencies of the Central or State Government, as the case may be. If after applying the afore-mentioned tests, the Court comes to the conclusion that they are instrumentalities or agencies of the Central or State Government, as the case may be, then their activity shall be deemed to be, and can be termed as “State action” and must conform to and answer the rights and injunctions enshrined in Part III of the Constitution and that, by treating a Corporation an instrumentality or agency of a Government, the Corporation does not cease to be a distinct legal entity, nor do its employees become the employees of that particular Government. (iv) A writ, order or direction can issue under Art. 226 to such Corporations, both for enforcement of fundamental rights and also for enforcement of a statutory right.

The test therefore is whether it is an instrumentality or agency of the Government and not as to how it is created. The inquiry has to be not as to how the juristic person is born but why it has been brought into existence. A juristic entity may be an authority and therefore a State within the meaning of Art. 12 yet it may not be elevated to the position of a State for the purpose of Arts. 309, 310 and 311 which find place in part XIV of the Constitution. If a Society is an authority and therefore ‘State’ within the meaning of Art. 12 it must follow that it is subject to the constitutional obligation under Art. 14 of the Constitution (c). So the Calcutta High Court held that writ lies against the National Textile Corporation which was incorporated and registered under the Companies Act, 1956 (d) and the Andhra Pradesh High Court in the Full Bench decision held that the Irrigation Development Corporation and the Leather Industries Development Corporation of that State were the instrumentalities or agencies of the State and therefore fell within the definition of State in Art. 12 of the Constitution though incorporated under the Companies Act, 1956 (e). The Supreme Court very recently struck down that part of the regulation of Air India governing the retirement age of air-hostesses holding that it gave uncontrolled, unguided and absolute discretion to the managing director to extend or not to extend the period of retirement after they attained the age of 35. The regulation was directed to be suitably amended in conformity with the provisions of Art 14 of the Constitution (f).

We conclude this discussion by quoting what Iyer J. said in *Som Prakash's* case—

(c) *Ajay Hasia v. Khalid Mujib*, A. I. R. 1981 S. C. 487.

(d) *S. N. Banerji v. Union of India*, 85 C. W. N. 517.

(e) *B. Satyanarayana v. State*, A. I. R. 1981 A. P. 125 (Supra.)

(f) *Nergesh Meerza & Ors v. Air India*, (reported in the *Statesman* dated Aug. 30, 1981).

It is well known that "Corporations have neither bodies to be kicked nor souls to be damned" and Government Corporations are mammoth organisations. If Part III of the Constitution is halted at the gates of Corporations Justice Louis D. Brandeis's observation will be proved true:

The main objection to the very large Corporation is that it makes possible—and in many cases makes inevitable—the exercise of industrial absolutism. Constitutional conscience necessary.

It is dangerous to exonerate Corporations from the need to have constitutional conscience; and so, that interpretation, language permitting, which makes governmental agencies, whatever their mein, amenable to constitutional limitations must be adopted by the Court as against the alternative of permitting them to flourish as an *imperium in imperio*.

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